TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 12

JOSEPH EDWARD MORISSETTE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 6, 1951.

CERTIORARI GRANTED MAY 7, 1951.

SUPREME COURT OF THE UNITED STATES

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[fol. a] UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH EDWARD MORISSETTE, Defendant and Appellant,

vs.

UNITED STATES OF AMERICA, Plaintiff and Appellee

Criminal No. 4469

Appeal from the District Court of the United States for the Eastern District of Michigan, Northern Division

[fol. 1] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

(Vio. Sec. 641—Title 18)

(Theft of Government Property)

Date	Proceedings
1949	
May 12.	Indictment filed.
May 12.	Property bond in amount of $500.00 filed.
May 16.	Defendant arraigned, stood mute, plea of not guilty entered—released on personal recognizance to await trial.
May 19.	Transcript of court reporter filed.
May 20.	Acknowledgement of copy of indictment by Atty. Transue.
May 27.	Appearance of Andrew J. Transue of Flint, Michigan, as attorney for defendant filed.
June 4.	Order in re photographs filed and entered.
June 13.	Trial by jurors begins.
June 14.	Trial continued and verdict of guilty returned.
June 14.	Defendant sentenced to custody of the Attorney General of the United States for a period of two months or a fine of $200.00—fine to be paid within 15 days and court costs to be paid.
June 14.	Judgment and sentence filed and entered.
June 15.	Defendant's request to charge filed.

June 24. Petition and order continuing bond of defendant filed and entered.

June 24. Notice of appeal, filed.

June 24. Copy of notice of appeal with docket entries forwarded to U. S. Circuit Court of Appeals for the Sixth Circuit.

Aug. 1. Opinion of court and order denying motion for new trial filed and entered.

Aug. 20. Transcript of court reporter in re proceedings as of June 13th and 14th, 1949, filed.

Sept. 1. Transcript of court report of proceedings as of June 14, 1949 filed.

Dec. 27. Court stenographer's transcript of proceed-s as of June 13 and 14, 1949, filed by Attorney Transue.

[fol. 2]

Date	Proceedings

1950

Feb. 3. Order from circuit court of appeals dismissing appeal for want of prosecution unless reinstated within 30 days from February 1, 1950, filed.

Feb. 8. Certified copy of order from Appellate Court granting defendant 45 days from February 6, 1950 to complete and file record.

Feb. 20. Additions and corrections to proposed record on appeal of testimony taken and court proceedings filed by U. S. Attorney.

Mar. 4. Order in re exhibits.

Mar. 6. Stipulation as to contents of the record filed.

Mar. 6. Stipulation waiving comparison of the record filed.

[fol. 3] UNITED STATES OF AMERICA IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

Criminal No. 4469

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOSEPH EDWARD MORISSETTE, Defendant

INDICTMENT—Filed May 12, 1949

(Sec. 641, U. S. C., Title 18)

(Theft of Government Property)

The Grand Jury charges:

That on or about the 2nd day of December, A. D., 1948, at Oscoda, Michigan, in the Eastern District of Michigan, Northern Division, Joseph Edward Morissette, did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United [fol. 4] States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18.

A true bill.

Alfred Grueber, Foreman.

Edward T. Kane, United States Attorney, by Janet E. Kinnane, Assistant U. S. Attorney.

IN UNITED STATES DISTRICT COURT

ORDER—Entered May 16, 1949

Said defendant being present in open Court with Andrew Transue, his attorney, and being duly arraigned on the indictment heretofor filed against him, waives reading thereof and stands mute, thereupon the Court ordered a plea of not guilty entered, and said defendant is released upon his existing bond to appear for trial later.

Frank A. Picard, United States District Judge.

[fol. 5] IN UNITED STATES DISTRICT COURT

ORDER—June 6, 1949

A motion having been made at the time that the above named respondent, Joseph Edward Morissette, was arraigned before this Court on the indictment in the above cause to permit pictures to be taken on the Oscoda Air Force Base, Michigan, of the location and approach to certain old and used bomb casings remaining there, that being the location from which the respondent is accused of stealing old bomb casings, property of the United States of America, it having been represented to the Court that the taking of such pictures are material in the respondent's defense, and the Court being fully advised in the premises,

On motion of Andrew J. Transue, of Transue & Hood, the attorneys for the above named respondent, it is ordered that the Command Officer of Oscoda Air Force Base, Michigan, permit pictures of the approach to the old bomb casings remaining on said Air Force Base and the remains of said old bomb casings remaining there to be taken by the respondent, his attorneys, or photographers brought there by them for the purpose of taking such pictures.

(S.) Frank A. Picard, Judge of the District Court of the United States of America.

Approved as to form:

(S.) Janet E. Kinnane, Asst. U. S. Attorney.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

Transcript of Proceedings and Evidence

Proceedings had in the above entitled cause, before the Honorable Frank A. Picard, District Judge, and a Jury, at Bay City, Michigan, on June 13, and 14, 1949.

(The jury retires from the Courtroom).

Mr. Transue: May it please the court, the respondent moves to quash the indictment for the reason that it is

charged in parts in the words of the statute while it does not charge a felonious intent.

The Court: Have you read the law?

Mr. Transue: I have read the law.

The Court: What is it? Read it.

Mr. Transue: Title 18, Section 641.

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;"

Insofar as this is applicable, that is the part.

The Court: What do you say it lacks?

Mr. Transue: It does not charge a felonious intent.

The Court: I tell you what I will do, I will go ahead and hold it in abeyance for the time being, and if the government doesn't produce any authority tomorrow morning the case will be dismissed. Call in the jury.

Leo Edward May, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Leo Edward May. I live at Oscoda, Michigan. I am seventeen years of age. I have seen bomb casings. I have seen bomb casings other than on the bombing range. [fol. 7] I saw them on a red Studebaker truck at the junction of M-171 and U. S. 23. It was called to my attention as it was a red Studebaker truck like ours; and second in the scrap drive for the Chamber of Commerce and Agriculture we tried to get them and couldn't get them. I wondered why anybody else could get them when we couldn't get them for our scrap drive. The truck was not moving when I saw it. The truck was parked off the side of the road to stop, talking to a man. It was stopped there and he was talking to a man, I just saw him. He stopped and talked. I was on the school bus, going home. I went home and told my father.

Cross-examination.

By Mr. Transue:

This was in broad daylight. The truck was heading toward Oscoda. That is toward Bay City too. It was a stake body truck and the casings lay out there in plain view.

Myron May, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Myron May. I am employed at the Army Air Base at Oscoda. I live there too. Leo May is my son. He made a report to me about seeing some used bomb casings. After I received this information I went up to the post and talked to Captain Askelson the next morning.

Q. And to your knowledge have any of these used bomb casing--been allowed to be removed?

Mr. Transue: I object to that, it is not material.

The Court: He may answer as to his knowledge. As a matter of fact I think the only one that can do that is the War Assets Surplus Corporation.

Mr. Transue: I object to it.

[fol. 8] The Court: His knowledge—what he knows. Do you know whether or not they have been released?

A. Not that I know of.

Cross-examination.

By Mr. Transue:

I have been employed at the Oscoda Air Base seven years. I am familiar with the location of the old bomb casings. I think the location is about twelve miles from the main set of buildings, that is by air. By the road it is about twenty-four miles or something like that, according to which way you go. You can go the long way or short way. I am not familiar with the road that leads right into the target because there are about eight of them, I think. I think there are two bomb targets. Four or five years ago I was at the one from which these old used bomb casings were removed. I haven't been there since they were removed.

Q. Now, when did they start piling those up there?

A. Well, they have been bombing out there for years.

Q. Fifteen or so years, haven't they?

A. Not that type, I don't think. Only about four years or five.

Q. Four or five years of that type?

A. Yes.

Q. How long since they have done any bombing of that type?

A. Probably two or three days.

Q. And they have been piling them up during the time that they have been bombing?

A. They are out there. I couldn't say they piled them up.

Q. Do you know who piled them up in these piles?

A. No.

Q. They allow deer hunters to hunt?

A. They aren't supposed to be there.

Q. You know they do hunt up there?

A. It is all marked. They are not supposed to be there.

The Court: That is Government property up there?

A. It is leased to the Government.

[fol. 9] Howard Sampson Askelson, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Howard Sampson Askelson. I am commanding officer of the Oscoda Air Base. I have been commanding officer since July 1948. We do have signs around the Oscoda Air Base on the property we use for bombing. Those signs are still there. Periodically we go around and put those up that have been knocked down, and replace those that the paint might be worn off of. We have a sign on the entrance to the road to our bombing target. It is "Danger, Keep Out, Bomber Range." I gave you this map, an official map showing the territory that is covered by the base up there.

(The map was received in evidence).

(Captain Askelson marks out area with red pencil showing air base, bombing range and targets).

The target itself was cleared. The used bomb casings were piled on the edge of the cleared out range. There were signs on the road leading to the bombing target, showing it was the bombing target about December 1, 1948. I was out there about 2 days ago and the signs were up then, and I was there December 10, 1948 and the signs were up then.

Q. Now, Captain Askelson, have you ever had any authority on or before December 1, 1948 to dispose of these used bomb casings?

A. No, ma'am.

When the bomb casings are new they are painted blue in color. This is a used bomb casing, I brought from the field today. The bomb casing is as shown here, without the rust. It is painted blue. It is about three and a half feet long, about eight inches in diameter, and empty it weighs around sixteen pounds. And when we use the bomb one hundred pounds of sand is put in it and a three-pound charge of black powder in the rear. Those are the bombs that were used in the practice bombing by the Air Force. The airfield is a sub-base of Selfridge Field. They do all the practice bombing at the Oscoda Air Base. The last time I know that they used bombs was today.

[fol. 10] Q. And this pile that is near the target, what is the reason for them being piled up there?

A. To decontaminate the target area proper.

The Court: That is a military expression. It doesn't mean much to me.

A. They clear all the spent bomb casings off and pile them up so that they will be out of the way. Just clear the area.

Q. Now, is there any danger in these used bomb casings?

Mr. Transue: May it please the court, that is a prejudicial question; it is not involved here, and I ask that it be stricken and the jury instructed to disregard it. It certainly is not involved.

The Court: What is the object of the question?

Miss Kinnane: To show why they haven't salvaged them.

The Court: Because of danger?

Miss Kinnane: Because of possible danger.

The Court: I would be interested in hearing his answer.

A. There is a danger if the black powder has not exploded. When the bomb drops it will in some cases not explode.

Q. Have any of these bomb casings been released since you have been there?

A. No, ma'am.

Mr. Transue: I object to that.

The Court: It has already been answered.

The Court: I would like to know whose Air Force this is. I don't even know who owns these yet.

By Miss Kinnane:

Q. Captain Askelson, who are you employed by?

A. The Government of the United States.

Q. What base is this and who owns these used bomb casings?

A. The United States Government.

[fol. 11] Cross-examination.

By Mr. Transue:

(Exhibits 1 to 6 marked).

Q. Captain, showing you Defendant's Exhibits 1 through 6, I will ask you to look at them and tell me what they are?

A. Spent bomb casings.

Q. And are they at the location? These pictures were taken on the Oscoda Air Base, were they not?

A. On the Oscoda Air Base gunnery range.

Mr. Transue: I offer them all in evidence. They were taken in the presence of the Captain by Kenneth Wallace, a commercial photographer from Flint, Michigan.

Miss Kinnane: Do you recognize these, Captain Askelson, as the places where these pictures were taken?

A. I was there when they took the pictures. It appears to be the same.

The Court: Are you willing to say those are the pictures they took?

A. Yes.

Miss Kinnane: Then there is no objection.

Q. Now, showing you this Exhibit 1, can you state whether or not that is a picture of the pile, a close up of the pile of spent bomb casings that is right close to the road? You and I and the photographer and Mr. Morissette all went out there and took these pictures last Friday, didn't we, Captain?

A. Yes.

Q. And is that the location of that picture?

A. Yes, sir. These are pictures of bombs on our range.

Q. What I am getting at, right as you get near to the end of the road there is this group of bomb casings that lays just to the left, that is right?

A. Yes, sir.

Q. And isn't that a picture of that group?

A. It appears to be, yes.

Q. Is it?

The Court: He says it appears to be.

Q. Then showing you this Exhibit 2, is that another view of the same group? Can you tell that?

[fol. 12] A. I would say it appears to be, yes, sir.

Q. Then showing you Exhibit 5, I will ask you whether or not that is another view, a little farther back, of the same bomb?

A. Yes, sir.

Q. Spent casings?

A. Yes, it is.

Q. Now, showing you Exhibit 4, is this a view from another direction of the same ones?

A. Yes, sir.

Q. There are three piles of these bomb casings in this particular locality, isn't that right?

A. Yes, sir.

Q. And the one is at the end of the road and farther to the left, over some little distance, isn't that right?

A. Yes.

Q. And I will show you Exhibit 6 and ask you if that is a photograph of that?

A. Yes.

Q. This Exhibit 3, is that another picture of the same group, that is over and to the left of the road? Do you understand my question? State whether or not it is a

different view of the same group of the last exhibit that you took?

A. It appears to be, yes, sir.

Q. In this Exhibit 3 there is also the target, or the place where the target is. What do you call this?

A. It isn't a target.

Q. No, that isn't a target. What do you call that?

A. Range house.

Q. And that is where you stay while the bombing is going on, to tell whether it is a hit or not?

A. That is right.

Q. I guess that is about it. That looks out toward it, doesn't it? And this one you just looked at is looking toward the woods, is that right?

A. Yes, sir.

The Court: Now the witness has taken the position you were up there and took some pictures, and they look like it, as far as he knows.

Mr. Transue: It appears like it.

[fol. 13] A. Yes.

Q. When we went up there, Captain, right in front of this group that is to the left there is now a sign, isn't that right?

A. That is right.

Q. As to whether or not there was any sign there, such as that, on December 3, 1948, are you able to say?

A. At that particular point, no.

The Court: What is this sign? How does this sign read?

Q. Do you recall how the sign reads?

A. "Danger. Bombing range. Keep out. United States Army."

Q. But as to whether or not that was there—That is a new sign, isn't it?

A. I don't know.

Q. Didn't it look new?

A. It appeared to be.

Q. And a little farther along there is a small sign that appeared to be new as well, isn't that right, Captain?

A. There was a sign there.

Q. Didn't it look like it was a fresh sign?

A. Not particularly.

Q. Well, now, as to whether or not that sign was there on December 2nd, are you able to say?

A. No, sir.

Q. And any of those signs that we saw all the way up that road, are you able to say whether they were all there on December 2nd?

A. No, sir. I wasn't there December 2nd.

Q. Now it is a fact that people hunt deer through that area, isn't it, Captain?

A. Yes, sir.

Q. By the way, that is government property there, isn't it?

A. Yes.

Q. Do you lease it, or how do you hold it, do you know?

A. It is leased.

Q. From whom?

A. From the Conservation Department and Department of Agriculture.

[fol. 14] Q. Conservation Department of the State of Michigan?

A. Yes.

Q. Department of Agriculture of the State of Michigan?

A. Yes.

Q. And the distance from where you live, the highway, that is kind of a main highway going around there up to where these old spent bombs lay, is about five or six miles up through the woods?

A. From the main road?

Q. Well, from the road where you turn in to go up through there.

A. It is about half a mile from the traveled road.

Q. You think it is about half a mile?

A. Yes.

Q. How far is it from Mikado?

A. I don't know exactly.

Q. Where the main group of buildings is where I saw you, you have your headquarters, how far is it from there?

A. The way we came?

Q. That is right.

A. Twenty-four miles; another way about eighteen.

Q. And by air do you know how far it is?

A. Approximately twelve miles.

Q. That is quite a heavy wooded section back in there, just general deer hunting country like the rest of it up there, isn't it, Captain?

A. Yes.

Q. And how long have you been at Oscoda, in charge?

A. Since July 1948.

Q. How long have you been there altogether? I mean, were you there before you were in charge of the base?

A. Yes. I have been going eight years gunnery captain up there.

Q. How long have you been going there?

A. I was stationed there in 1944; since then.

Q. When was the first time that you went up through the woods, as we did the other day, not in an airplane, but to go so you could see what is on the ground?

A. About a year ago.

Q. That was the first time?

A. Yes.

[fol. 15] Q. And were these old bomb casings that we saw in the pictures there at that time?

A. Yes.

Q. Do you know how long they have been using that particular type of bomb casing at Oscoda Air Base, and shooting it over that target we saw out there that day?

A. The first I used them there was in 1944.

Q. Were they used before that to your knowledge?

A. I don't know.

Q. How long have you been in the Air Service?

A. Nine years.

Q. How long have they had that particular type of practice bomb casing?

A. I am not sure.

Q. How long that you know of?

A. 1944.

Q. That is the first you saw them?

A. Yes, sir.

Q. They might have had them sometime before that, or if they did have them would you know?

A. They might have had them, yes.

Q. And might they have been used at the Oscoda Air Base before that to your knowledge, and you wouldn't know it?

A. Possibly, yes.

Q. So far as you know they have been collecting these things together up there and piling them up since at least 1944?

A. Yes.

Q. And they have been out there and exposed to the weather, are they?

A. Yes.

Q. Are they rusted, the ones we saw?

A. Yes.

Q. They are pretty well rusted out, aren't they?

A. They are rusted, yes.

Q. Some of them so rusted that they are practically decomposed, isn't that right, Captain.

A. I guess so.

Q. And the rest of them are in the process of decomposition?

A. Yes.

[fol. 16] Redirect examination.

By Miss Kinnane:

Q. Captain Askelson, you testified that you were out in this area on December 10th and there were signs up that day?

A. Yes.

Q. A. ! were those signs you saw on December 10th new signs or did they look as if they had been there a few days?

A. They looked as if they had been there.

Q. And had you seen signs at that particular location before December 10th?

A. Yes.

Q. Now, these holes that are in the used bomb casings, do they come from rust or from explosion?

A. Both.

Q. Did Mr. Morissette at any time ask your permission to take these bombs?

A. No.

Q. And what did you do after the report came in to you that these bombs were seen on a truck going south?

A. I notified the State Police; notified the CID Section in Selfridge Field. I asked the State Patrol to find out where they went, who got them.

Right in front of that group of bombs there is now this sign you and I have talked about. That sign appeared like a new sign. I do not recall that particular one. I saw that one when I was out there on December 10th.

Q. Now these signs that are back here farther, there is an older appearing sign as we came into the area, isn't that right?

A. Yes.

Q. That sign says "danger", or something to that effect?

A. Yes, sir.

[fol. 17] Q. Captain Askelson, these signs you told us about being there on December 10th, are they just around this area, or around the entire bombing range.

A. They are around the entire bombing range.

The proceedings had on Tuesday, June 14, 1949, at 10:00 o'clock a. m.

Defendant's witness called with permission of Court out of turn.

MARSHALL HILLMAN, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Transue:

My name is Marshall Hillman. I reside at Flint. My address is 1106 Lomita. I have known Joe Morissette, the respondent in this case, since 1927. I have lived in the same vicinity that he has resided in since the 17th of March, 1927. I know his reputation for honesty and integrity in the community in which he lives. It is good. I am employed by Consumers Power Company as chief maintenance foreman. I have been in this position since 1928. I have worked for the Consumers Power Company since 1927. I have worked for this company 21 years and better. I am also acquainted with the reputation of Joe Morissette in the community in which he lives for truth and veracity. It is good.

Cross-examination.

By Miss Kinnane:

Q. With how many people have you discussed the reputation of Mr. Morissette for honesty and veracity?

[fol. 18] A. None because I have known him so long.

Q. And you are taking the stand as a character witness here and that is your own opinion then?

A. Yes, ma'am.

Q. You have never discussed this man's character in any way with people in your vicinity?

A. Oh, there is lots of people know Joe.

Redirect examination.

By Mr. Transue:

Q. You know what other people think of him?

A. They can't think anything different than I do.

(The court met pursuant to adjournment).

The Court: I tell you what I am going to do, I am going right ahead, and without prejudice to any of the rights of the defendant to bringing the matter up in event of a conviction.

John V. Wagner, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is John V. Wagner. I live at Oscoda, Michigan. I am a truck driver. I am acquainted with the defendant, Joseph Edward Morissette. I got acquainted with him when he was on a fruit stand at the junction of M-171 and M-23.

Q. On or about the first part of December 1948 did you see Mr. Morissette with a load of bomb casings?

A. I don't know what type of load it was. It was in the fall.

Mr. Transue: I can't hear the witness.

A. I say I don't know just what time it was. It was in the fall when I seen him. I don't know the date.

Q. And whereabouts was that?

A. I met him at the junction of M-171 and 23.

Q. Did you have any conversation with him that day?

[fol. 19] A. Yes, I did.

Q. What was the nature of that conversation?

A. Well, I had stopped him, asked where he got the scrap steel. I seen he had some bomb casings.

Q. Was anything else said while you were talking?

A. I told him he was taking a chance, advised him to take them back where he got them.

I don't remember what he said he was going to do with them. I have lived up around Oscoda for twenty-two years. During that time I have had occasion to go around the bombing range that is marked out on that map. I worked there three years. I always saw signs posted around the bombing range. They are warning signs, all of them. Some of them said, "United States Government Property—Stay Off." They are on all the roads around the bombing range that I went on.

Cross-examination.

By Mr. Transue:

I have been arrested and convicted of bootlegging in 1934.

Q. Any other arrests and convictions?

A. For drunkenness, getting drunk. No, I never served time for being drunk either, I take that back.

Q. Now, witness, on October 8, 1946, at Tawas weren't you arrested and pleaded guilty to being disorderly?

A. They advised me to.

Q. Did you do it?

A. Yes, I did. Yes, I did. I had forgotten that.

Q. Were you ever arrested for any thing else?

A. No, just drunk.

Q. Now, as a matter of fact, weren't you arrested on February 26, 1949, for felonious assault?

A. Yes.

Mr. Transue: That is all.

A. The case was dropped.

The Court: All right.

[fol. 20] MARVIN ATCHISON, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Marvin Atchison. I live at Mikado, Michigan. That is Northeast of the bombing range, approximately sixteen miles. Joseph Edward Morissette is my brother-in-law by marriage. The last week of deer season in 1948 I accompanied him to the bombing range. We hunted the bombing range. We went over to the bombing range to pick up used bomb casings. We made two trips to the bombing range. After we left the bombing range we took them over to the farm where I am employed. When we got to the farm we smashed them down and loaded them on the truck with other stuff he had loaded. We smashed them down with a tractor. When we loaded them on the truck with some other things he bought he headed for Flint as far as I know. That is where he hauled all his scrap iron. I do not know whether he had permission to get these used bomb casings. I was paid for helping him.

Cross-examination.

By Mr. Transue:

I live on a farm. It is my uncle's farm. It is in Mikado, Michigan. That is approximately sixteen miles from the place where we got those old bomb casings. I have lived there for the last twenty-five years, all the time I wasn't in the service. My wife, aunt and uncle live there. I was raised by my aunt and uncle. My sister is Joe Morissette's wife. She was raised there too, part of her life. My aunt and uncle really brought me up. He is sixty-two, and she is in her fifties somewhere. They operate a farm there. The farm is three hundred and fifty acres, all told, with the land we rent. I did deer hunt with Joe. Pat Collins went up one trip with us. We didn't get a deer. I believe it was right in deer season when we went over to get the old bomb casings. We were hunting with Pat Collins for two days. It was after that. We used Joe's truck. There were deer hunters came past us when we were getting these things. There were three cars stopped there while

[fol. 21] we were loading them. We talked with these deer hunters. It was in broad daylight. After we got it loaded on the truck we took it to Mikado, got gas, and went over to our farm. We stopped in another place on the way to the farm, one of our neighbors, and he had some scrap iron to sell and Joe went over and bought that. We took it over to the farm and unloaded it, in the field, right in the corner in plain sight, about ten rods from the road. You could see it from the road in plain sight. It lay out there close to a week. I took the tractor and backed over it for Joe to smash down so he could load it with other stuff he bought, make the load more compact. I wasn't there the day he loaded out. I owed Joe some money. Somewhere around sixty dollars. I understood I was to get paid for my time and labor.

Redirect examination.

By Miss Kinnane:

I didn't have permission to hunt on the bombing range when I went over there this fall, but there had been hunters in there for as long as I could remember. I didn't ask anybody's permisison to hunt on there. I have seen signs posted around the bombing range since I came home from the service.

Recross-examination.

By Mr. Transue:

I have been hunting over there for years. I had never seen them bombs there until after I came home from the service, in 1947. I hunted in the fall of 1946 when I was home on leave. I went up through there in 1946. It didn't look like anything of value to me.

[fol. 22] Howard Smith, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Howard Smith. I am employed by the Michigan State Police. I am stationed at East Tawas. I have

been there the last time since 1946. I was there in 1938 and 1939. I am familiar with the bombing range. I do patrol duty. We get up through the bombing range at least once or twice a month. I have seen signs posted around the bombing range since 1946. These signs say "Danger—Keep Out—Bombing Range." I have seen and know Mr. Morissette, the defendant in this case. He had a fruit stand on the corner of U. S. 23 and M-171 last year. I talked to him in connection with the loss of these bomb casings. That was on December 10, 1948, in Tawas City, south of Tawas City on U. S. 23. He had a load of Christmas trees on his truck at that time. I stopped Mr. Morissette and asked him if he had taken some bomb casings from the Air Base. He stated he had and had taken them to Flint where he had sold them for twenty-eight dollars a ton. I believe he said he had a little over three ton on the truck. He told me he got twenty-eight dollars a ton. We asked him if he had permission to take them and he said no, he didn't think they were any good, or anybody would care if they were hauled away. He said he didn't have any permission to take them.

Cross-examination.

By Mr. Transue:

Joe was coming down with a lot of Christmas trees when we stopped him. I believe we asked him for his operator's license first, and asked him if he would come back in the patrol car so we could talk with him. He did this readily and answered all our questions frankly and freely, without any hesitation on his part. I have been around this territory where the bombs are. I was there in November, three or four times in November, the last part. I have seen bomb casings. I don't know whether defendant's exhibit 1 are the ones or not. I have seen bomb casings there. I have [fol. 23] been on pretty near all those roads in that area at sometime or other. I told you I was up there in November on official business. We had quite a few emergency messages to deliver to hunters along those roads in that area. I never paid too much attention to the location from which these old casings were taken. I could not see whether or not there were any signs in the immediate vicinity of that location. I know there are signs on the road but whether

they are right there I don't know. There were other deer hunters up there.

Q. All over the bombing range?

A. I didn't go out on the range but there were all over the edge.

Q. I mean in the territory known as Oscoda Air Base.

A. Yes, in that territory there were a lot of hunters around the bombing range.

ROBERT EDWARD WALTON, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kinnane:

My name is Robert E. Walton. I am employed as Special Agent of the Federal Bureau of Investigation. I was assigned to investigate part of this accident. I usually cover Detroit territory. However, I was on what is called a road trip to Flint, Michigan, at the time this case was assigned to me. In the course of my investigation I talked with the defendant, Joseph Edward Morissette. I was out to see him. I went to his home at 5117 Horton Street, which is in Flint. However, he wasn't there at the time but I talked to one of his relatives and informed her that I would like to talk to Mr. Morissette. Approximately one week later Mr. Morissette came to the Resident Agent's Office in Flint, Michigan, and at the time he came into the office I was engaged in another matter and I could not talk to him. [fol. 24] He came about half an hour later, I was through and I talked to Mr. Morissette. At the beginning of our conversation I advised him that he didn't have to make a statement; that any statement he made could be used against him in court; and that he could consult an attorney at any time. Mr. Morissette did furnish me with a statement. Mr. Morissette initialed the first two pages of the statement and signed the last page of the statement. This was to indicate that he had read the statement. There was a correction made in the statement which Mr. Morissette also initialed. That was done before it was signed. I have that statement with me.

(Government's Exhibit 1 marked and offered in evidence and received without objection.)

By Miss Kinnane:

Q. Will you read this into the record, Mr. Walton?

A. This statement is dated "January 20, 1949, FBI Resident Agency, Office at Flint, Michigan.

"I, Joseph Edward Morissette, freely and voluntarily make the following statement to James P. McElligott and Robert E. Walton who have both identified themselves to me as Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice. No threats or promises of any kind have been made to induce me to make this statement. I know that I do not have to make a statement and that any statement I make can be used against me in a court of law. I know that I am entitled to consult counsel at any time. I can read and write.

"I am 27 years old having been born August 15, 1921, at Flint, Michigan. My mother and father are deceased but I have two sisters named Beatrice Parrek and Doris Rothr. My wife's name is Geraldine and I have one son Joseph Edward Morissette, 5 years old.

"On November 22nd or 23rd, 1948, I, along with my brother-in-law, Marvin Atchison, were deer hunting on the U. S. Government Air Force bombing range at Oscoda, Michigan. We knew previously that the bomb casings were on this range at Oscoda but we went there to hunt deer. We did not get any deer so we decided to make our hunting trip pay by loading up my 2 ton, 1948 red Studebaker with the bomb casings. My brother-in-law 'Mike' Atchison helped me load about 3 tons of the bomb casings [fol. 25] onto my truck and we left and went to Marvin's uncle's (Alger Anderson) farm and unloaded the bomb casings. I told Alger Anderson my load at the time consisted of bomb casings that I wanted to smash together so that I could carry more on my truck and then take them in to Flint to sell them. On or about the 2nd of December, 1948, I and 'Mike' (Marvin) Atchison loaded the bomb casings on my truck and took them to Flint, Michigan, where we sold them to Joe Laro's Coal and Iron Co., 6301 N. Dort Highway in Flint, Michigan. My load was weighed by a girl in Joseph Laro's office and I believe her name is Catherine. I know she knew my load consisted of used

bomb casings and she paid me about $85.00 for my load. She paid me by check. The bomb casings still had some blue paint on them and the tail fins were still recognizable when I sold them to Laro. I saw other men hunting on the Oscoda range and so I thought I could walk on this property also. I knew the bomb casings were at one time U. S. Government property but I did not know if they were when I took them. I did not know these bomb casings were not to be removed from where they were.

"I have read the above statement consisting of three pages, initialed all changes and corrections, and the bottom of each page and I am signing this last page. This statement is true and correct to the best of my knowledge.

"(Signed) Joseph E. Morissette.

"Witnesses: SA James P. McElligott, FBI; SA Robert E. Walton, FBI, January 20, 1949, Flint, Michigan."

Mr. Morissette did not ask for an attorney at that time. As I recall Mr. Morissette came into the Resident Agency Office at Flint, Michigan, shortly afterwards and inquired as to the status of his case, but I didn't have any further discussion with him.

[fol. 26] Cross-examination.

By Mr. Transue:

Part of this statement is in my handwriting. The statement is in three people's handwriting, Mr. Morissette, a witness and myself. The part that is written out here, I wrote that, all except the last paragraph. Everything on the first page is in my handwriting, except Joseph Morissette's initials on the bottom of the page. Everything on the second page is in my handwriting except Joseph Morissette's initialed one correction on this page and he initialed the bottom of the page. On the last page, the third page, Joseph Morissette initialed one correction on this page also. The last paragraph of this statement was in Joseph Morissette's handwriting, which states: "I have read the above statement consisting of three pages, initialed all changes and corrections, and the bottom of each page and I am signing this last page. This statement is true and correct to the best of my knowledge.

"(Signed) Joseph E. Morissette."

I talked to Mr. Morissette about this affair and then I tried to reduce the substance of the conversation.

Q. And so along with the rest of it, when Joe told you, as he told the State Police: "I knew the bomb casings were at one time U. S. Government property but I did not know if they were when I took them. I did not know these bomb casings were not to be removed from where they were." Now, Joe told you that along with the rest of it just the same as he told the State Police, didn't he?

A. Yes, he did.

Q. And you put it in the statement?

A. That is right.

After I let somebody else know at his house that I wanted him, he came into the office voluntarily. Prior to the time that I obtained a warrant for Mr. Morissette's arrest I did not get up and look at these old bomb casings. I have never seen that location. I have never been up on the Oscoda Bomb Range.

[fol. 27] Q. And so at that time you were unfamiliar with the looks of what Joe took as exemplified by this Exhibit 3, isn't that correct?

Miss Kinnane: I object, your Honor. He said he has never been up there so he can't testify to any pictures that were taken up there.

The Court: He can answer. If he doesn't know he can say no.

A. No, I don't.

By Mr. Transue:

Q. You don't know what they look like at all, do you?

A. No, I do not.

Redirect examination.

By Miss Kinnane:

Q. Did you ever see a bomb casing in your investigation at Flint?

A. Yes, I did, on one occasion when I went into the Joe Laro Coal and Iron Company at Flint, Michigan, Mr. Laro presented me with a bomb casing which he said one of his employees had obtained from his junk yard.

Q. And is that bomb casing here?

A. Yes, it is.
Q. Will you show me which one it is?
A. Yes, sir, this bomb casing.

Miss Kinnane: I will offer this bomb casing in evidence as Government's Exhibit No. 2.
The Court: Any objection?
Mr. Transue: No objection. Glad to have it in.

CATHERINE KENNY, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Miss Kinnane:

My name is Catherine Kenny. I am employed as bookkeeper for Laro Coal and Iron Company, Flint. I have [fol. 28] worked there for the past twelve or fifteen years. I am not personally acquainted with Joseph Edward Morissette, but I recognize him and know who he is. On or about the 1st part of December I bought scrap from Joseph Edward Morissette. I looked at it when it came on the scale. I have the records of Laro Coal and Iron Company with me, and the check stubs. Our check stubs show we paid Mr. Morissette for scrap in the first part of December. The dates we paid him are December 2 and December 6. Those check stubs were made in the regular course of business and in my handwriting.

(Government's Exhibits 3 and 4 in evidence:)

Mr. Transue: No objection.

By Miss Kinnane:

Q. Government's Exhibit No. 4 is a check stub dated when?
A. December 12, 1948.
Q. And issued to whom?
A. Issued to Joe Morissette.
Q. And what was the purchase?
A. It was for 8,160 pounds of mixed scrap.
Q. And how much did you pay him?
A. $28 a ton.

Q. And what is the total of that check?
A. $114.24.
Q. And Government's Exhibit 3 is dated when?
A. December 6, 1948.
Q. To whom?
A. To Joseph Morissette.
Q. For what?
A. For 2,070 pounds B, that is bailing scrap, at $28 a ton or $28.98; 650 pounds metal at 3¢ a pound, $9.75; 10,070 pounds of mixed scrap $251.75. Total check $290.48.
Q. Do you remember whether or not that purchase consisted of casings?
A. The bailing scrap,—it was mixed loads that Mr. Morissette brought in mostly—but the bailing scrap that might have been. I don't remember these two particular loads.
Q. It could have been but you don't recall, is that correct?
A. I don't remember.

[fol. 29] Cross-examination.

By Mr. Transue:

Q. Do you know, witness, whether or not both loads had this old stuff on, or what was on it?
A. As I remember, I don't recall this thing here at all, this blue one there. This one here, there might have been some on one load; but I didn't see on this mixed load, it was mostly steel cast and heavy scrap.
Q. Will you identify which one of these checks paid for the one that had some of those old tins on there that have been identified here as used bomb casings?
A. I really couldn't.
Q. You don't know which load it was. Now, Mr. Morissette has hauled a lot of junk into the Laro Coal and Iron Company, hasn't he?
A. That is right.
Q. Over how long a time?
A. I have been on the Dort Highway two years. I would say all of those two years that I have been in that location I have seen him periodically——
Q. At different times?
A. —once or twice a week.
Q. In the summer time did you see him?

A. Not so much in the summer but occasionally.
Q. Mostly in the fall and winter time?
A. That is right.

Redirect examination.

By Miss Kinnane:

During the month of December I believe there is one other stub in this bunch that we purchased. This was all the scrap bought in December, that was in the last part of December.

Miss Kinnane: Government rests.

[fol. 30] JOSEPH EDWARD MORISSETTE, called as a witness on his own behalf, being first duly sworn, testified as follows:

My name is Joseph Edward Morissette. I was born in Flint, August 15, 1921. I am twenty-seven years old. I am married. I was married eight years in January. I have one child. He is six years old. I am living with him and my wife at 5117 Horton Avenue in a trailer house. My uncle owns the house at 5117 Horton Avenue. I am engaged in the fruit business at the present time, located at G 5010 North Saginaw Road, just outside the city limits of Flint. I have been in this location since this spring. Last year I operated a fruit market at Oscoda. I was in the United States Army and was honorably discharged. I was honorably discharged from the United States Army in February, 1944, I believe. I was in the CC Camps. I was sixteen years old when I went to the CC Camp. I went there because I had no other means of living at home. Just my mother was living. She died while I was in. My father passed away about a year and a half before that, so I went to the CC Camp to take care of myself. I have never been arrested or convicted of anything except speeding one time. I have worked at fruit markets, and hauled scrap iron, and done a little trucking. I worked in the A. C. Spark Plug for four and a half years, I guess. I was in the A. C. Spark Plug when I went into the service and I went back when I got out. From the A. C. Spark Plug I went into business in a fruit market. I haul Christmas trees every year. I have one

truck, a Studebaker, 1948 Studebaker, a stake truck. I went deer hunting last fall. Mr. Collins went with me and another party from Cheboygan, Steve Cineski and his wife, and a few other people. We went over on Drummond Island for a week and then I came back and I hunted at my brother-in-law's place for the second week. Mr. Collins hunted with me around Oscoda for two days and I took him over to his brother's place at Evart. And my brother-in-law and I hunted ourselves the rest of the time. While I was hunting with Mr. Collins and my brother-in-law, we were hunting on the Oscoda bomb base. The bomb base woods is very good deer country. Nobody got a deer there. My father-in-law got one out of there, and I guess an uncle [fol. 31] of ours got one out of there, but not when I was with them. Pat Collins got a deer up at Drummond Island. When we were hunting we saw these old tins that were expended bombs. I have seen all those pictures. I am familiar with them. I was there when the pictures were taken. Exhibit 3 is a picture of a pile that is down at the end of the road and to the left, that is back. We never even seen that pile until we was there with you. Neither one of us, I don't believe, has ever seen that. That was back off the road. Defendant's Exhibit 6 is another picture of the same pile looking toward the woods. Defendant's Exhibit 2 is what is left of a pile from which we took something. The ones we took looked exactly like the ones that remained there. Defendant's Exhibit 5 is a picture of two piles that are right close together from which we took some from each pile. The ones we took look about like the ones that are left. That is right on the side of the road. The road that goes up through there is a trail. They have them marked off in mile sections. While we were up there hunters came by, we talked to them. Three of them was in a coupe and they stopped and talked to us for a while, asked us about deer and stuff. I don't recall the names of any of those folks, I had never seen them before. Defendant's Exhibit 4 is a picture of the two piles from another view from which we got some of those old bomb casings. The ones we took look the same as the ones that are left. Over toward the far side of the picture is the road that is traveled and this picture is taken looking toward that road. Defendant's Exhibit 1 is a close-up of one of those piles from which we took some of the old bomb casings and the ones we took looked

like the ones that are still there. Marvin Atchison was with me when we got them. Mr. Collins and Mr. Atchison were with me when I first saw them there. There is now a sign in front of those two piles that are close together.

Q. Was that sign there when you——

A. No. That sign wasn't there.

It was broad daylight when we took them out of there, about one or two o'clock in the afternoon. I imagine eight or ten people passed through there while we were taking them. A couple cars drove by and this one coupe stopped [fol. 32] and talked. I took them out to the farm, around twenty miles from where they lay. We just threw them out in the field with the rest of my junk. I had about six or seven tons piled around there. I bought that around garages, farms. Everybody know I was picking up junk through there, and they used to come and see me and get me to go over and buy it, clear up their yard. This pile of junk, including what was left of these old bomb casings, was out in plain view of the road. Anybody could see that was driving along. We left them right there until—we was deer hunting, you know, and we finished up—and when we had some spare time we took the tractor and run over it so I could get on some of my other junk, some of my steel and stuff. Mr. Atchison had to do some plowing or something, and he went away, and I hired a couple of kids to help me load up my truck that day. And I had Mr. Collins' deer stored at the plant locker. He stored that there when we first came back from Drummond Island. That plant locker is located right over by the air base. I got loaded up and went over to the locker, got the deer, and started toward home. That pavement is 171 and it goes around this air base. I came down that road in broad daylight, it was right in the afternoon. I had an army stake body on my truck, open, these old bomb casings were in plain view. I went over to the locker. I don't remember the name of the man who has the locker. There is only one place there and he is the operator of it. It is outside the village, out toward his farm. I would say a mile, mile and a quarter out of the village, maybe two miles. It is quite a ways. You turn off the highway and go back in about a quarter of a mile, or half a mile. Mr. Wagner's daughter-in-law was there taking care of the children that afternoon. She was the only one there. I got the deer and loaded it on

myself. Then I started toward Flint. It was still daylight. To get to Flint I took 171 pretty near to the junction of 23. Mr. Wagner came by in a truck and he flagged me down and I stopped, and he came back and talked to me and told me he had some scrap over to his place he wanted to sell. He wanted me to pick it up. I told him I couldn't take it then but I would come back and maybe get it on my next [fol. 33] load. And he asked me what I had on and I told him I had some old bomb casings on. I heard what he said in regard to telling me to take them back. Nothing like that was ever said. I talked to Mr. Wagner about five minutes, ten minutes, I don't know. I had been previously acquainted with him. I became acquainted with him when I was running my fruit market on the junction of 171 and 23. Right at that corner there is a beer tavern a little farther in and I had, right out in the open, a fruit stand. I also did a wholesale business in this fruit business. I sold to stores and restaurants all the way from Oscoda. I started in around Pinconning and ended up around Alpena, all the stores, restaurants, and stuff like that. That was last summer. During that time I got acquainted with Mr. Wagner, and when I stopped there I knew him and he knew me.

The Court: Is Wagner the one said he told him to take this back?

Mr. Transue: That is right.

By Mr. Transue:

Q. And you have already told us nothing like that was said, is that correct?

A. That is correct.

I would never have stopped but he waved his hand so I stopped. He said he had some stuff over in his yard that he wanted to sell. From there on I think I stopped and had a sandwich. I think it was in Oscoda or around Houghton there. I parked my truck right there on the highway, up in front of the restaurant in broad daylight. I made no effort to conceal anything. I didn't think there was any reason for me to conceal anything. I kept on going after I got the sandwich. I sold this to the Larco Coal Company. I don't know which one of these two loads had these old casings on it. I don't quite remember the date that I took them down. They had the stubs, and I had about seven ton of other stuff. We put three ton of that there stuff on and

you have quite a large load, which I imagine it was on that $114 load. A little while after that I went up north to Cheboygan and bought some Christmas trees and I recall the State Police stopping me. I told them about the old bomb casings. Just like the officer said. Later on I heard [fol. 34] the FBI man wanted to see me. I went right down and saw him. I went down the next day after I knew he wanted to see me. He asked me about these bomb casings. I told him right out and he wrote out the paper that has been presented here. I have been buying junk off and on for about three and a half, maybe four years. I go all over, pretty near all over Michigan to buy this junk. I go up through the Thumb, around Port Huron, Bad Axe. I have even been up as far as Marquette on the other side, above the Straits; get around over in Lansing once and a while, and through there. I generally do it in the winter months. In the summer I run a fruit business. I am in that business now. I operated a fruit stand up there last summer and during that time I was going north, and around, and wholesaling fruit.

Cross-examination.

By Miss Kinnane:

Q. And you were aware of the area covered by the bombing range?

A. Just in deer season. There is nothing around there anybody wants to get back in there for any other time.

The Court: Were you aware of the signs around the bombing range?

A. In some places.

Q. How often had you been at the bombing range before you went deer hunting this last fall?

A. Well, I have been in there about for the last three years, deer hunting.

Q. And you knew that was the bombing range that belonged to the United States Government, right?

A. I knew it had at one time.

The Court: Did you know it at the time? She asked you that question.

A. Yes.

Q. You know it is still being operated up there as a bombing range?

A. I didn't know it was being operated as a bombing range.

Q. What made you think there had been any cessation in the operations up there, Mr. Morissette?

[fol. 35] A. I had heard from hearsay they didn't do any more bombing up there.

Q. Just hearsay. You don't know of your own knowledge?

A. No, I don't.

Q. You never made any inquiries, did you?

A. No, I never.

Q. Do you make a practice of going around picking up things that are on other people's property?

A. I don't.

Q. This wasn't your property?

A. No, it wasn't.

Q. Did you have any permission to be on it?

A. No, I never, no.

Q. Did you have any permission to pick up the bomb casings?

A. No.

Q. They didn't belong to you?

A. No, they never.

Q. And how big is the stake body on your truck?

A. It is a ton and a half rated—two ton truck. It is about eleven feet long, about eight feet wide—seven feet six inches wide.

Q. You made how many trips over to pick up bomb casings.

A. I imagine we was there once or twice—twice, I think.

Q. And after you crushed these bomb casings down you had about three ton of bomb casings, right?

A. I did.

Q. And on top of that you loaded other stuff?

A. I had some steel underneath it and around onto it.

Q. You mean you just sort of tucked these bombs around the top?

A. No. They were out in plain sight so everybody could see them.

Q. You loaded the bomb casings on first, is that right?

A. No, I never.

Q. You put the other stuff on first?
A. That is right.
Q. Sure of that?
[fol. 36] A. Yes, I am.
Q. On top of that you put a deer?
A. I put the deer on the cab of my truck.
Q. Put that on the cab of your truck?
A. Yes.
Q. What did you put over the top of the bomb casings to hold them in the rack?
A. I never put nothing.
Q. They were just loose up there?
A. That is right.
Q. And you had three ton of them, is that right?
A. Somewhere around that. I don't know for sure.
Q. Approximately how much other stuff did you have?
A. Well, I had batteries, about fifty-five batteries worth four dollars apiece—about a couple hundred dollars.
Q. How much did they weigh?
A. What, the batteries? Well, I imagine a battery will weigh about thirty-five pounds.
Q. Anything else you had on that truck?
A. Had some steel.
Q. How much did it weigh?
A. I don't know.
Q. You don't know?
A. That is right.
Q. Isn't it a fact, Mr. Morissette, that you were arrested for reckless driving and not speeding?
A. It was somewhere in there.
Q. There is a difference between speeding and reckless driving, isn't there?
A. I don't know if there is or not.
Q. Did you pay a fine?
A. I did.
Q. How much did you pay?
A. Thirty-five dollars, I believe.
Q. And was that an alternative to a fifteen-day sentence? Was that an alternative to a fifteen-day sentence?
A. I imagine it was.
Q. Do you know or don't you?
A. I believe I know.
Q. Now, this happened along about the first part of December, right, Mr. Morissette?

[fol. 37] A. What?

Q. That you brought these bomb casings down to Flint?

A. Somewhere after deer season.

Q. What time does it get dark along the first part of December?

A. I imagine 4:30 or 5 o'clock.

Q. And what time would you say you started to bring these down to Oscoda?

A. From Oscoda?

Q. To Oscoda?

A. I started out from the farm about 1:30 or 2 o'clock in the afternoon.

Q. What time did you leave Oscoda?

A. Well, I imagine it was about 4 or 4:30.

Q. Mr. Wagner testified and Mr. May testified he saw you approximately around four or four-thirty at the junction of U. S. 23 and M-171. Would you say that is about right?

A. Somewhere around that time, yes.

Q. It was beginning to get dark then, wasn't it?

A. Oh, no. You could see very plainly. There were no lights or anything on. I would probably be around Omer or Standish by the time it got dark.

Redirect examination.

By Mr. Transue:

The corner of 171 and 23 is about a mile north out of the city limits of Oscoda.

Q. You think it was 1:30 or 2 o'clock when you left the farm?

A. Yes.

Q. Why would it take you two hours to get to the place where you saw Mr. Wagner?

A. I had to load that deer on by myself and it was quite a job.

Q. Took you sometime to go in and get that deer, is that right?

A. Yes.

Q. What was there from the appearance of this junk out there in the woods that made you think it had been thrown away?

[fol. 38] A. It was rotting.

Q. Part of the tin and things were decayed?

A. That is right.
Q. Rusted right out?
A. Yes.
Q. And so you thought it had been abandoned?
A. That is right.

Recross-examination.

By Miss Kinnane:

Q. It was still on property of the United States Government, wasn't it, when you picked it up?
A. I guess it was.
Q. You guess it was. Don't you know?
A. I didn't know at the time, no.
Q. Didn't you testify you hunted on the bombing range?
A. I did.
Q. Isn't the bombing range government property?
A. It is if it is marked. There is some State land around there, too.

The Court: You knew it wasn't your property, didn't you?
A. Yes.
The Court: Didn't you say on cross-examination you knew this was government property where you got the bomb casings, didn't you say that?
A. Yes, sir.

Q. In your statement, Mr. Morissette, didn't you say you were hunting deer on the United States Government Air Force bombing range at Oscoda, Michigan.
A. Yes.
Q. You knew that was government property then, didn't you?
A. Yes.

[fol. 39] Lionel Collins, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Transue:

My right name is Lionel Collins. They have it Pat, there. That is a nickname, that is what you know me by. I live

at 1118 Ruth, Flint, Michigan. I have lived at Flint around thirty years. I work at the Chevrolet. I have worked there better than twenty-five years. I have worked as a set-up man around twelve or thirteen years. I am married and have three children. I went deer hunting with Joe Morissette last fall. I have known Joe ten or twelve years. We went to Drummond Island. I got a deer. We came back and hunted two days around Oscoda. I left my deer in cold storage. We went over to the Oscoda Air Base and hunted. I saw other hunters over there. There were plenty of them. I saw these old bomb casings up there in the woods. I didn't see any sign close to the junk. I call it junk because that is what it looked like to me. I knew Joe was hauling junk into Larco Coal Company.

Q. Did you say anything to him about that that would be junk to haul?

A. Yes, sir.

Q. Do you remember the conversation?

A. I asked him if that was worth anything.

Q. Yes.

A. He said it would be if he could get it smashed down so he could get enough of it so it would pay him.

Q. I see. And that was the conversation that took place there?

A. That is right.

I live in the same part of Flint that Joe Morissette lives in. I know quite a few people that know him. I know part of his friends and neighbors. I am acquainted with the reputation of Joe Morissette in the community in which he lives for honesty and integrity. It is good.

[fol. 40] Cross-examination.

By Miss Kinnane:

I have never gone hunting with Mr. Morissette before. I have never been up around Oscoda before. I saw the signs back on the road when I approached the bombing range. They had been there but they were pretty well shot to pieces. I can't tell you what the sign said. I saw one sign. I was driving along the edge of the bombing range. I drove right through it I believe. I can't show you on the map where I came in that day. I am not acquainted with this country. I did not ask anybody who owned this junk,

as I call it, these bomb casings. I wasn't on my own property. They didn't belong to me.

Q. They had some value to you though if you took them?

A. I don't know.

Q. If you had taken them they would have had value to you?

A. They wouldn't be no good to me.

I didn't help Joe load this stuff on the truck. I wasn't up there when he went in and got it. I don't actually know whether he took it or what happened. I just went hunting with him.

Q. How many people have you talked to and discussed the reputation of Mr. Joseph Morissette as to integrity and honesty?

A. Not at all.

Redirect examination.

By Mr. Transue:

Q. You also know his reputation in the community in which he lives for truth and veracity? Answer that yes or no. Do you know the reputation of Joe Morissette in the community in which he lives for truth and veracity? Answer yes or no.

A. Yes.

Q. Is it good or bad.

A. It is good.

[fol. 41] By Miss Kinnane:

Q. How many people, Mr. Collins, have you discussed the reputation of Mr. Morissette as to truth and veracity with?

A. None.

Redirect examination.

By Mr. Transue:

Q. You don't go around talking about the truth and veracity of people, do you, Mr. Collins, of your friends and neighbors?

A. No, I don't.

Q. You are just like everybody else in that regard?

A. Try to be.

Recross-examination.

By Miss Kinnane:

Q. How do you know what somebody else thinks then of Mr. Morissette, Mr. Collins, if you haven't talked to them?

A. I believe I am well enough acquainted so I would hear.

Q. All you know is what you think yourself, isn't that it?

A. That is right.

Redirect examination.

By Mr. Transue:

Q. You mean by that all you know is what you think yourself, and what other people think of Joe?

A. Yes.

Q. Is that right?

A. That is right.

[fol. 42] Richard T. Marlett, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Transue:

My name is Richard T. Marlett. I live at 1059 Marengo. That is in the north part of Flint. That is in the same vicinity that Joe Morissette lives. I have known Joe Morissette about twenty years.

Q. What is your business, Mr. Marlett?

A. Retired captain of fire department. I was captain of a fire department at Flint, Michigan, station No. 3 located at Wetherby and Detroit.

I spent six years at that station. I knew Joe's folks, his father and mother. I know they died quite a while ago. Joe is pretty well acquainted around that end of town, yes. He should be, he lived there long enough. I know the general reputation of Joseph Morissette in the community in which he lives for honesty and integrity. I would say it is good. I know the general reputation of Joe Morissette in the community in which he lives for truth and veracity. It is good.

Cross-examination.

By Miss Kinnane:

Q. Mr. Marlett, how many people have you discussed the reputation of Mr. Morissette with as to honesty and integrity?

A. Well, as a rule there is no occasion to discuss anythink like that.

Q. You have talked it over with anybody then?

A. About Joe's character?

Q. Yes.

A. Why, no.

Q. And have you ever discussed the reputation of Joe as to truth and veracity with anybody?

A. He is supposed to be a truthful man.

Q. Have you ever discussed the reputation of Mr. Morissette for truth and veracity with anybody?

A. Yes.

Q. Whom?

[fol. 43] A. With whom?

Q. With whom?

A. Name them, you mean?

The Court: Yes.

By Miss Kinnane:

Q. And on what occasion was that?

A. What is that?

Q. On what occasion was that, when?

A. I can't tell you no date.

Q. Was it lately, Mr. Marlette?

A. That I have talked to somebody about Joe's honesty and that, is that what you mean?

Q. His reputation for honesty, yes. The last question was his reputation for truth and veracity. Did you ever discuss Joe's reputation for truth and veracity with anybody?

A. Yes, I have.

Q. And who was that now?

A. Why, I can't name anybody. He is supposed to be, as a general rule, a truthful, honest man; that is what I believe.

Redirect examination.

By Mr. Transue:

Q. You heard people say good things about Joe?
A. That is right.
Q. The way he takes care of his family?
A. That is right.
Q. Tell us the good things you have heard about Joe.
A. The good things?
Q. Yes.
A. I understand he is a good worker, honest. I will say that about his working; and the honesty I will also say it myself.
Q. And is he well thought of by the people that he lives and works with?
A. Yes.

[fol. 44] JOHN BRANDON, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Transue:

My name is John Brandon. I live at 1110 Marengo Avenue, Flint. I have known Joe Morissette for twenty years anyway. I knew his folks. I knew his father and mother well.

Q. Are you acquainted with the general reputation of Joe Morissette in the community in which he lives for honesty and integrity; and answer yes or no?
A. Why, yes, I know him for years.

The Court: Do you know his reputation in the community?
A. Yes, his reputation is good.
Mr. Transue: Just one more question.

Q. Do you know the reputation of Joe Morissette in the community in which he lives for truth and veracity? Answer yes or no.
A. Yes.
Q. Is it good or bad?
A. It is good.

Cross-examination.

By Miss Kinnane:

Q. Mr. Brandon, have you discussed the reputation of Joe Morissette for honesty and integrity with anybody?

A. Why, I heard them talk about him now and then. I never heard nobody say anything bad about him.

Q. You have never discussed his reputation though?

A. What?

Q. You have never discussed his reputation?

A. No. I never have, no.

Q. Did you ever discuss his reputation for honesty and integrity?

A. No, I never have.

Q. In other words, your opinion is what you think of Mr. Morissette yourself?

A. Why yes.

[fol. 45] Q. Is that right?

A. I never heard a bad word about Joe in my life around there.

Q. How often do you see Mr. Morissette?

A. How often?

Q. How often do you see him?

A. I don't see him very often, maybe twice a week, twice a month, or something like that. He is at the market most of the time.

Mr. Transue: Respondent rests.

The Court: How much time do you want to argue?

Miss Kinnane: About twenty minutes.

The Court: Fifteen minutes a side.

All right, you might as well excuse the jury because I am going to tell you what you can argue on, and what you can't argue on.

Excuse the jury. Take them upstairs for a minute.

(The jury retires from the courtroom.)

The Court: Gentlemen, you have asked here an instruction. Have you seen the instructions that they ask?

Miss Kinnane: Yes.

The Court: Have you any objection to them?

Miss Kinnane: No, I haven't. You mean the ones he has? No, I haven't been served with them, your Honor,

if that is what I saw him hand up to you. I haven't seen them.

Mr. Hood: Here is your copy.

The Court: Have you any objection to that first one?

Miss Kinnane: Yes, your Honor. I think it is not incumbent upon us to show felonious intent at the time of taking. And a man's acts could be assumed, intent could be assumed from his acts.

The Court: It says, "If he thought the government had thrown away or abandoned this property, you will find him not guilty, if he is mistaken in his belief."

Do you think that is the law?

Miss Kinnane: I do not.

The Court: Neither do I. Gentlemen, I don't think it is the law. I am not going to permit you to argue to this jury that this man can go on somebody else's property, [fol. 46] take property, and then go away and say, "I thought they abandoned it."

Mr. Hood: May I say just one word on that point?

The Court: Certainly.

Mr. Hood: This further authority, 52 Corpus Juris Secundum 820.

The Court: The case you gave is not in point at all. The case was of an automobile on the street that had been there for six or seven days and left near a creek. People had stolen things out of it. It looked as though it had been abandoned, not on anybody's property.

Unless you can show me something right on the point, the only question might be the seriousness of the offense—that is the punishment. But certainly you cannot go on a piece of property, take something away, and say, "I thought they had abandoned it," because no farm in the country would be safe, and no home would be safe.

Mr. Hood: Your Honor, a felonious intent is an element of the crime.

The Court: Yes, sir. To do what?

Mr. Hood: Of a crime.

The Court: To do the thing that you did do. But you can't come in and say, "I thought it was abandoned." If you can show me any authority on that, where it is another man's property, I want to see it.

Mr. Hood: I want to distinguish between a crime and a trespass. There is no doubt but what it would be a civil

trespass case. If the government wanted to sue him, they could get their money for the value of the property, as a farmer could do. But there is a distinction between that and a crime, where a man is convicted of a felony for an honest mistake.

The Court: What honest mistake can there be when you go on another's man's property and take it? If you can show me something, gentlemen, I am in a receptive mood. But the case you show me is not in point. And besides that is not the law.

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority sells, conveys or disposes of any record, voucher, money, or thing of value of the United States [fol. 47] or of any department or agency thereof * * *" etc.
>
> "Shall be fined not more than * * *" this, that and the other.

Gentlemen, unless you have something ready, you needn't discuss it with me, because if that is the law I want to find it out.

Mr. Hood: On this Southwestern case, the point about that he was taking another man's property.

The Court: On a public highway.

Mr. Hood: But he was committing a trespass on another man's property, whether on a public highway or not.

The Court: If that is true, you can come into my house, and year after year you can see an old suit over in the corner that you think I have abandoned, and walk away with it and say, "I thought it was abandoned."

As a matter of fact, he was down to Lansing this week, he said, and if he had gone around the capitol and found it abandoned, he might have taken the capitol.

Mr. Hood: I can take the property your Honor, without committing a crime, if I honestly believe I have a right to take it, whether I am mistaken in my belief or not.

The Court: If he took this under color of right, that is one thing. He didn't take it under color of right, he took it because he thought it was abandoned and he knew he was on government property.

Mr. Transue: That is it exactly, Judge. He took it because he thought it was abandoned.

The Court: That is no defense. I won't permit you to argue it to the jury, and if I am wrong I am wrong, if that is the law of the United States.

Miss Kinnane: I could come in and take a car and say I thought it was junk.

Mr. Hood: What is the difference between a crime and a civil trespass? Is there none?

The Court: Gentlemen, when he walked on the property he committed the trespass.

Mr. Hood: How about the trespass of taking and carrying away?

The Court: That is also a civil wrong, but Congress has made that another kind of crime.

[fol. 48] You haven't shown me anything that changed my opinion in this case from the day the man was brought in here. That the court might consider in the punishment, that is entirely different.

Mr. Transue: May I say this?

The Court: Certainly.

Mr. Transue: Our theory of this is that if Joe Morissette, when he picked those things up, thought nobody wanted them, it would be like junk that would be alongside the road. It is the state of his mind at the time. You have to have a state of mind to be a thief.

The Court: The state of his mind was to take something that didn't belong to him, and there is the intent. If I am wrong, I am wrong. Bring in the jury.

I will not permit you to show this man thought it was abandoned. If that is the law I want a higher court than I am to say so.

As a matter of fact, if objections had been made on the character witnesses, the court would have ruled that out. I don't know why you should have got-en up here and asked the questions, and they didn't object to them. Those aren't character witnesses, none of them is a character witness, but I am going to permit it to go in, although I don't know why.

I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property.

All right. I don't know how much time you want now. You can have ten or fifteen minutes a side.

(The Court met pursuant to recess.)

Mr. Transue: May it please the court, we have been in the bar library in an endeavor to find material in support of our position.

The Court: All right, let me see it.

Mr. Transue: Could the jury be excused?

The Court: No, just bring it up here.

Mr. Transue: The question of intent, all of those cases under consideration say there must be felonious intent. That is a question for the jury.

(Discussion between court and counsel out of hearing of jury and the reporter.)

[fol. 49] CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury: It is the duty of the court to instruct you as to what the law is in this particular case.

I first will read you what the charge is against the defendant. They charge he violated Section 641, Title 18 of the Code.

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money or thing of value of the United States or any department or agency thereof or any property made or being made under contract for the United States or any department or agency thereof; * * *" shall be punished as follows.

This defendant, as all defendants in a criminal case is presumed to be innocent, and that presumption continues throughout the trial and during the deliberations of the jury, and is overcome when and only when his guilt is established beyond a reasonable doubt.

From the beginning of the trial until the end, the District Attorney has the burden of establishing beyond a reasonable doubt every fact essential to the conviction of the defendant. The defendant has no burden to sustain. It is enough that his evidence, taken with the people's raises a reasonable doubt as to his guilt, in which case he must be acquitted.

I have said that the government must prove its case beyond a reasonable doubt. Reasonable doubt does not mean a mere doubt, but it means just what the words themselves indicate, that there is a doubt founded in reason, and arising from the evidence, nothing extraneous, but from the evidence itself. It is not a mere hesitation of a mind to accept proof because of a more or less chance or possibility of error, or because of a disinclination to pronounce guilty on account of the punishment which may follow. You have nothing to do with the punishment at all. And if it should develop that there are mitigating circumstances, and that the defendant is guilty, it is up to the court, not you, to say what the punishment will be.

[fol. 50] You and I know this, everything relating to human affairs, depending upon evidence, is open to some possible, imaginative or speculative doubt. But reasonable doubt is a real doubt arising from the evidence, based on reason such as an intelligent man or woman can entertain, and if necessary to put into words could be explained.

In this case the defendant has brought forth some character testimony. I instruct you that evidence of the defendant's good character may be considered by you, with other evidence in the case, and may in connection therewith be sufficient to raise a reasonable doubt in your mind as to the guilt of the defendant. In other words, sometimes the case is so close that you ask yourselves, "What kind of reputation has this man got?" And it may even create a reasonable doubt, where otherwise there would be no reasonable doubt, no reasonable doubt would exist.

Now, let us see what is charged here, and let us see what the evidence shows. The evidence shows that the defendant in this case went up to Oscoda on the bombing range, property of the United States Government. He saw some of these old bomb shells up there, stacked. There were different piles all around. I permitted pictures to be shown to you as to just what they were. Now, he says that he thought that they were abandoned. He knew that they didn't belong to him, however. And I don't know whether the testimony proves this or not, but there is evidence to show, and you can arrive at the conclusion that he knew what they were from and for, what they had been—bomb shells. Anybody could see they were empty bomb shells. They were piled indiscriminately around the place where the target was.

He had been up there before, had been up there hunting. He hunted on government property, which may or may not be all right. I am not criticizing that because I think a lot of people do that. So it isn't a question whether he went up there and hunted on the property of the government at all. You can disabuse your mind of that entirely. But while he was up there he did find these stacks, and later on came up with his truck, took about three tons, took them down, and sold them.

[fol. 51] Now, he admits that. The defense that they sought to introduce here was that he thought it was abandoned property. And I instruct you that there are some instances where a person can take property that appears to be abandoned, and take it and really be guilty of no criminal offense. And this court permitted all the testimony to go in. But when it comes to the time of instructing the jury, I must instruct you that in this case there is no evidence of abandoned property. Abandoned means absolute relinquishment, including both the intent to abandon, and the external act by which the intention is carried into effect.

And when the evidence is such as to raise the issue, abandonment is a question for the jury. But ladies and gentlemen, I hold in this case that there is no question of abandoned property. In the first place, this man knew that he was on government property. He knew it was the bombing range. Whether he knew it or not is immaterial. The bomb shells were on somebody's property and they didn't belong to him.

In every crime there must be an intent to do the thing that the person does. For example, if you walk away with a thousand dollars in your pocket that you don't know is there, you hadn't intended to steal that thousand dollars at all. There is no intent. But the question is here. Did he intend to take the property? And I instruct you that if you believe the testimony of the government in this case, he intended to take it. And I further instruct you that if you believe his testimony, he intended to take it.

It isn't a question of whether the government is careless or not. You can go into a bank and if they have left a thousand dollars, or five hundred dollars, or any money on the counter carelessly, you can't pick that money up and say, "I thought somebody had abandoned it and, therefore, it belongs to me." That is no defense in this case. It is no

defense in this case any more than it would be if they came to your house and saw an old suit of clothes, or an old hat, and had seen it for years at your house and had never seen you wear it, but they decided you had abandoned that suit of clothes, or hat, and walked away with it.

[fol. 52] He had no right to take this property. He had no right, and it is no defense to claim that it was abandoned, because it was on private property.

Now, there are cases of abandonment, for example, where sometimes you see an old automobile along the road that somebody has left there, and by the time the vandals get through there isn't very much left, and somebody comes along later on and decides to take a part of that property. It has been left there in the road, in the highway. But if I were to hold according to the theory of the defendant here, that a man can walk on anybody else's farm, or anybody else's property, and pick up something, and do it in the open, and then sell it, and say, "I thought it was abandoned property and, therefore, I am not guilty," it would be a most unusual law. That is not the law as I understand it.

You may feel the government is to be criticized for leaving that property out there. I don't know whether it should be or not. The government, especially the Armed Forces, do a lot of things in leaving their property out, that you and I don't approve of, but how do we know what the government intended to do up there? Three thousand pounds of it was sold at somewhere near $84. They might have been waiting for it to get in such quantity that they could send a freight car up there and take it and sell it, because it might become very valuable. At one time during the last war that kind of junk was valuable. We don't know what may be in the minds of the military officials, and for any man to go up there and take the property, he is committing a wrong under this section of the act.

I don't think that this calls for any extended further instruction to this jury. You have taken an oath to follow the law as given by this court. Ordinarily there is a question of fact for the jury. I don't think there is any question of fact for the jury, except whether you believe one story or the other. You can go up there and come down and say not guilty. You can do that because you are the judges of the facts. But if you follow the instruction of the court, you

have got to believe one story or the other, or it is up to you to believe one story or the other. And I instruct you to [fol. 53] this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty.

That is all there is for this jury.

Any exceptions to the charge?

Miss Kinnane: None, your Honor.

The Court: You wish an exception to the charge?

Mr. Transue: Exception, of course.

The Court: Your exception is I should submit to the jury the question of abandonment?

Mr. Transue: Not only the question of abandonment, but also the condition of his mind and the intent that he had at the time that this was removed; that there must have been a felonious intent in his mind to take it away and not be just a trespass.

The Court: Well, all-right.

The question on infent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.

You may make any other objection on the record.

Mr. Transue: On the record?

The Court: After the jury has left.

Swear the officer.

(Officer sworn).

(The jury retires at 1:46 o'clock p.m.).

The Court: Now you may enter the objection.

Mr. Transue: The objection is this, as I understand the court's charge, that the taking is the intent.

The Court: No. I leave the question to them whether he intended to take it. He says he did.

Mr. Transue: But the taking must have been with a felonious intent.

The Court: That is presumed by his own act.

Mr. Transue: That is my exception.

The Court: All right.

[fol. 54]. Mr. Transue: That the felonious taking cannot be derived just from the taking.

The Court: All right, overruled.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUEST TO CHARGE

1. The defendant took the property and sold it. There is no question about that.

The question is: What was in Mr. Morissette's mind at the time he took it? Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.

Therefore, if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

2. "If the taking was open and notorious and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which presumption must be repelled by clear and convincing evidence, before a conviction is authorized."

(5 Reid's Branson Instructions to juries p. 133, Sec. 3365(2).

3. Good character is an important fact with every man, and never more so than when he is put on trial charged with an offense which is rendered improbable in the last [fol. 55] degree by a uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a shield of protection against the most skillful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring a conviction of innocence. In every criminal case it is a fact which the defendant is at liberty to put in evidence, and,

being in, the jurors have a right to give it such weight as they think it entitled to.

Transue & Hood, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

VERDICT—Entered June 14, 1949

(Indictment for Vio: Sec. 641 USC, Title 18—Theft of Government Property)

At a session of said Court held in the City of Bay City on the 14th day of June, A. D., 1949.

Present: The Honorable Frank A. Picard, United States District Judge.

The defendant, Joseph Edward Morissette, being present in Court, and the jury heretofore empaneled being again in [fol. 56] Court, and having heard the proofs and testimony of witnesses, the arguments of counsel and the charge of the Court, retire from the Bar thereof, under the charge of officers duly sworn for the purpose, to consider their verdict; and after being absent for a time, come into Court again, and in the presence of the defendant, say upon their oaths that they find the said defendant, Joseph Edward Morissette, guilty of the charge in said indictment contained.

Examined, approved and ordered entered:

Frank A. Picard, United States District Judge.

IN UNITED STATES DISTRICT COURT
JUDGMENT AND COMMITMENT

(No. 4469 Criminal Indictment in One count for violation of U.S.C., Title 18, Sec. 641)

On this 14th day of June, 1949, came the United States Attorney, and the defendant Joseph Edward Morissette appearing in proper person, and with his attorney, Andrew J. Transue, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to-wit: Theft of Government Property and the defendant have been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court It Is By the Court

[fol. 57] Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two months from and including this date, or to pay a fine of Two Hundred ($200.00) Dollars for the use and benefit of the United States, together with the costs of the case, which payment is to be made within fifteen (15) days from this date.

It Is Further Ordered, that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) Frank A. Picard, United States District Judge.

Approved as to form:

(S.) Janet E. Kinnane, Asst. U. S. Attorney.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 24, 1949

The name and address of appellant is Joseph Edward Morissette, 5117 Horton Street, Flint, Michigan, and the name and address of the appellant's attorneys is Transue and Hood, 304 Dryden Building, Flint, Michigan.

The offense is charged as follows: The indictment sets forth and the Grand Jury charges, "That on or about the 2nd of December, A. D., 1948, at Oscoda, Michigan, in the [fol. 58] Eastern District of Michigan, Northern Division, Joseph Edward Morissette, did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings have a value of approximately

$84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18. A true Bill, Alfred Grueber, Foreman."

A concise statement or order, giving the date and sentence is, The defendant was found guilty as charged in the indictment on June 14, 1949 and was sentenced by the Court, the Honorable Frank Picard presiding, to be imprisoned in a place to be selected by the Attorney General of the United States for Two months or a fine of $200.00 and costs of $133.98. The amount of cost is according to a letter sent me by the Assistant United States Attorney at the direction of the Court. The defendant was on bond and his bond was continued.

The above named defendant, Joseph Edward Morissette, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the above stated judgment and conviction.

Dated: June 23, 1949.

Transue and Hood, Attorneys for Appellant.

[fol. 59] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR NEW TRIAL—August 1, 1949

The motion for a new trial by defendant having been made, briefs of counsel filed, and the Court being fully advised in the premises, and in accordance with the opinion of the Court;

It is ordered that the motion of defendant for a new trial, be and the same hereby is denied.

Frank A. Picard, District Judge.

Order re filing record omitted.

[fol. 60] IN UNITED STATES DISTRICT COURT

ORDER—March 4, 1950

Pursuant to subdivision I of the rules of civil procedure, and on motion of Andrew J. Transue, attorney for the above named defendant and appellant,

It is ordered that defendant's exhibits 1, 2, 3, 4, 5, and 6 be sent to the Circuit Court of Appeals for inspection and use in connection with defendant's appeal.

It is further ordered that the said exhibits may be transmitted to the Circuit Court of Appeals by the defendant.

Frank A. Picard, District Judge.

[fol. 61] Stipulation as to contents of the record omitted.

Stipulation waiving comparison of the record omitted.

[fol. 62] Clerk's Certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(October 6, 1950—Before: ALLEN, MARTIN and McALLISTER, JJ.)

This cause is argued by Andrew J. Transue for appellant and by Janet E. Kinnane for appellee and is submitted to the Court.

JUDGMENT

(Entered February 5, 1951)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION

(Filed February 5, 1951)

Before ALLEN, MARTIN and MCALLISTER, Circuit Judges.

MARTIN, Circuit Judge. On this appeal from a judgment of commitment and sentence, the only significant issue is whether the district court erred in its interpretation of Title 18, section 641, United States Code, which provides: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; * * * Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The appellant contends that, in order to constitute a crime, there must have been a felonious intent in his mind at the time he converted to his own use property of the United States located on premises leased by it. This argument was rejected, the district judge taking the practical and correct view that the statute means what it says and is violated when a person "knowingly converts to his use" government property. The facts of record cannot reasonably be controverted that the appellant knew what he was doing, namely converting to his own use property of the United States when he took and carried it away and subsequently sold it for his own benefit. In effect, he merely denies that he had an evil or felonious intent.

The further insistence is made that if appellant believed that the government had abandoned the property taken by him, he should not have been found guilty, though mistaken in his belief. The district judge charged the jury that there was no evidence of abandonment of the property by the United States, and that appellant's

claim that the property had been abandoned constituted no defense in the circumstances.

The uncontroverted proof shows that appellant took from property leased by the government some three tons of used bomb casings, owned by the government, and sold them for approximately $84.

Briefly reviewed, the salient facts are that appellant, a junk dealer who also operated a fruit stand in the summertime, went on a deer hunt with his brother-in-law. They entered upon Oscoda Air Base which was leased by the United States from the Conservation Department and the Department of Agriculture of the State of Michigan. This military reservation was used as a practice bombing range and was in such use on the day of the trial.

In a statement voluntarily made to the Federal Bureau of Investigation, appellant related that he and his hunting companion did not get any deer, so they decided to make their hunting trip pay by loading up his two-ton truck with used bomb casings. Without permission of the Commanding Officer of the air base, or without permission of anyone representing the United States, appellant took and carried away from the government reservation, in two truck loads, some three tons of used bomb casings undeniably property of the United States. The used bomb casings were piled on the edge of a cleared-out range and were each about three and one-half feet long, eight inches in diameter, and when empty weighed around sixteen pounds. The Captain commanding Oscoda Air Base testified that he had never had authority to dispose of used bomb casings, and that appellant at no time had asked his permission to take any of them. Morissette admitted that he had received no permission to pick up the bomb casings and knew that they did not belong to him. After taking the used bomb casings to a nearby farm and crushing them, appellant loaded his loot into his truck. He carried the bomb casings to Flint, Michigan, and sold them there to a coal and iron company. He testified that the bomb casings were rusted and that he thought they had been aban-

doned. He emphasized that he took them in broad daylight and made no effort at concealment. After considerable hedging, he finally admitted under questioning by the judge that he knew the bomb casings were on government property when he took them.

The statute which appellant violated (Title 18, sec. 641, United States Code) condemns not only the embezzlement, stealing and purloining of government property, but also the knowing conversion by a person to his own use, or to the use of another, of anything of value belonging to the United States, or the sale or disposition without authority of any government property. The conversion to his use and the selling of the bomb casings without authority were, as appears from the record, knowingly done by the appellant.

Appellant's attorney urges that both the indictment and the statute require proof of felonious intent. We are unable to accept this interpretation as valid. As to the indictment, the federal courts long ago abandoned the course of reversing convictions for crime on the technical niceties of pleading. An indictment is sufficient which fairly apprises the defendant of the charge which he is to meet and enables him to prepare his defenses and, after trial, to stand against double jeopardy upon a plea of former acquittal or former conviction. This court has frequently stated the principle. *Dowling Bros. Distilling Co., et al.* v. *United States,* 153 F. (2d) 353, certiorari denied 328 U. S. 848, rehearing denied 329 U. S. 820; *Bogy* v. *United States,* 96 F. (2d) 734 (and cases there cited), certiorari denied 305 U. S. 608; *Blum* v. *United States,* 46 F. (2d) 850. Authorities from other circuits are overwhelmingly to the same effect. See cases digested in 34 Federal Digest, section 71, under title "Indictment and Information." See also Rule 7(c), Rules of Criminal Procedure, 1950 Revised Edition, wherein, after prescribing the essential contents of a valid indictment, it is provided: "The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged

therein to have violated. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." The indictment in this case fully meets the test. Morissette was sufficiently apprised of the charge against him and could never again be convicted for taking the used bomb casings here involved and selling them as he did.

The statute in question (section 641) which consolidates sections 82, 87, 100 and 101 of Title 18, United States Code, 1940 Edition, is not limited in coverage to embezzling, stealing and purloining government property, but also blankets the knowing conversion of such property by anyone to his own use. It is not at all unusual in federal statutes to find that Congress has, in a single paragraph, defined separate and distinct crimes involving different elements.

Manifestly, the purpose of Congress in enacting section 641 was to afford added protection against the taking of government property. The word "or" as used in the statute evinces that purpose. If it had been intended to require knowing coversion to fall within the same category with embezzlement, stealing and purloining, the word "and" would have been used in the statute. Furthermore, the phrase "knowingly converts to his own use or the use of another" would be surplusage if placed in the same category with embezzlement, stealing and purloining.

Though we had independently reached our conclusion as to the correct construction of section 641 before research brought to our attention *Adolfson v. United States*, 159 F. (2d) 883 (C. A. 9), we find that case supports our own interpretation. There, the Court of Appeals for the Ninth Circuit was required to construe section 87 of Title 18, United States Code, which was one of the statutes consolidated into section 641 of Title 18. See Title 18, U. S. Code Congressional Service, 80th Cong., 2d Sess., page 2505. The Court of Appeals in the *Adolfson* case stated that the insistence of Adolfson was

that section 87 is purely an embezzlement statute; that the indictment charged embezzlement and nothing more; and that to "apply the property of another to one's own use is to embezzle." The contention was thus rejected: "The simple language of section 87 refutes that argument for it covers several specifically named offenses wholly apart and divorced from the technical offense of embezzlement. One of these specifically and separately named offenses is that of knowingly applying to one's own use property 'furnished or to be used for the military or naval service.' The prohibition against knowingly applying Government property appears in the text of section 87 after the word 'or' which follows the reference to the offense of embezzlement. The use of the word 'or' clearly indicates alternative circumstances (Cf. *Barkdoll* v. *United States*, 9 Cir. 147 F. (2d) 617, 618) and was obviously intended to identify and define a wholly separate and distinct offense, and we so hold. Appellant would have us read out of section 87 a meaning, a purpose, a definition, and a protection of public property which to us clearly appears to speak the plain intent of the lawmakers." 159 F. (2d) 885, 886.

In passing, it might well be observed that, while the pertinent portion of the statute before us exacts as essential to conviction knowledge by the accused that he is converting property of the United States to his own use, scienter is not even an essential ingredient of all statutory crimes defined by Congress. In *United States* v. *Behrman*, 258 U. S. 280, 288, the Supreme Court said: "If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent." See also *United States* v. *Jackson*, 25 F. 548 (C. C.); *United States* v. *Guthrie*, 171 F. 528, 531 (D. C.). An outstanding authority on the subject of scienter is the opinion of Chief Justice Taft in *United States* v. *Balint*, 258 U. S. 250. The Supreme Court there held that, to constitute the offense of selling drugs contrary to the Anti-narcotic Act, 38 Stat. 785, it is unnecessary that the seller be aware of the character of the drugs; and that punish-

ment for an illegal act done by one in ignorance of facts making it illegal is not contrary to due process of law. See *United States* v. *Reese*, 27 F. Supp. 833, applying this principle to the Migratory Bird Act.

Appellant urges that, inasmuch as he believed the bomb casings which he took, carried away and sold had been abandoned by the government, there was presented a question for the jury with appropriate instructions as to what was the condition of Joseph Morissette's mind at the time he took the bomb cases.

Abandonment of property, in order to exculpate one taking it, must include both intention to abandon and an act or acts carrying such intention into effect. As was held in *Log-Owners' Booming Co.* v. *Hubbell*, 135 Mich. 65, 69 (an action of replevin), both the intention to abandon and actual relinquishment must be shown. It will not excuse one who takes property without permission to state that he was under the impression that the property had been abandoned and that he had a right to take it. In the case before us, the property of the United States taken and converted to his own use by appellant was not without value and had merely been stacked up and left lying on the government military reservation. Appellant made no investigation as to his right to take the property, and neither asked nor received permission to take it. One witness testified that, when he saw the used bomb casings on the truck upon which appellant moved them away, he "wondered why anybody else could get them when we couldn't get them for our scrap drive for the Chamber of Commerce and Agriculture." Captain Askelson, Commanding Officer of the Air Base, testified that he had never been given authority to dispose of the used bomb casings owned by the United States Government; that Morissette at no time asked his permission to take them; and that when he received the report that the government property had been taken he notified the state police and a section of the Criminal Investigation Division of the Army, and asked the state patrol to find out who got the bomb casings and where they were.

Generally speaking, the question of whether property has been adandoned is, of course, for the jury; but here, as the district court held, all the testimony proves that the property had not been abandoned by the government of the United States, and the district judge so instructed. The defense throughout was based upon insistence that, in order to convict there must have been a criminal intent in the defendant's mind. The trial judge had to meet that issue, and we think correctly did so. He could not leave to the jury the interpretation of the federal statute. No proof was adduced by the defendant to the effect that the property had actually been abandoned.

The comments in the charge of the judge show that he believed appellant had no legitimate defense. In our opinion, greater restraint in expression should have been exercised. The court, however, charged the jury as to the burden upon the government to prove its case beyond a reasonable doubt; that the defendant was to be presumed innocent, unless the presumption was overcome by the establishment of his guilt beyond a reasonable doubt; and that the jurors were the judges of the facts of the case and could return a verdict of not guilty.

As we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions. To reverse and remand for a new trial because of the expressions of the district judge in his charge would be to ignore the spirit as well as the letter of Rule 52(a) of the Federal Rules of Criminal Procedure respecting harmless error. That rule provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." As was said in *Kotteakos* v. *United States*, 328 U. S. 750, 764, 765: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress."

The lenient sentence imposed evinced a sound exercise of judicial discretion vested in the district courts in em-

powering them to make the punishment fit the crime within the limits of the statute violated.

The judgment is affirmed.

McAllister, Circuit Judge, dissenting. Appellant was indicted for unlawfully, wilfully, and knowingly stealing and converting to his own use metal bomb casings from a bombing range of an Army Air Base in Michigan. He was convicted, and appeals, claiming that the district court erred in virtually directing a verdict of guilty against him.

The background of the case is as follows: Joe Morissette, age twenty-seven, an honorably discharged American soldier, lived with his wife and small son in the northeastern part of Michigan, at a small town, Oscoda. To support his family, he worked in fruit markets, hauled scrap iron, and did a little trucking. He owned a small motor truck. In the fall of 1948, he was deer hunting with his brother-in-law and a friend in the bomb base woods in the neighborhood where he had been living. This is a large wooded and waste area owned by the Conservation Department of the State of Michigan, and is located almost in the midst of state and national forests and state game areas, operated as public hunting grounds. It had been leased to the federal government as a base for training Army bombers. Among sportsmen, it was known as good deer country and was used for hunting by many people.

In using the so-called bomb base for training bombers, Army planes dropped practice bombs on a certain portion of the area. These practice bombs are made of a thin casing of metal about 3½ feet long and 8 inches in diameter. Approximately 100 pounds of sand is poured into a casing, and on top of this is placed 3 pounds of black powder. When the casing is dropped to the earth, the black powder is ignited, and the smoke puff shows the location of the strike. After the practice bombs have been used, they are cleared off the range and thrown in

piles beyond the target area "so that they will be out of the way," as the commanding officer of the base expressed it.

In hunting through the area in the fall of 1948, Morissette and his two companions came upon one of these piles of old used bomb casings in the middle of the woods. The casings in question had been cleared off the target area and thrown into piles for approximately four years. They were exposed to the weather and were pretty well rusted out. Some were practically decomposed and others were in the process of decomposition. The pile was located about half a mile from a traveled road and about six miles from the main highway. Morissette testified that he thought the casings had been abandoned and it occurred to him to take a load of them over to the farm where he kept his junk pile of scrap metal purchased from farmers and collected through the countryside. He planned to flatten the casings out so they could be more easily transported. At the time he came upon the pile, he had his truck nearby, and his two companions helped him to load it with the casings. It was broad daylight. Other hunters coming through the woods saw them loading the casings and stopped to talk to them about the prospects of getting deer in the locality. After Morissette got the casings to his junk pile, he flattened them out, reloaded them on his truck with other metal scrap, and drove to Flint, where he sold them for $84.00. Altogether, they weighed three tons. On his way to Flint, a distance of 180 miles from where he had found the casings, they were in full view on his truck. He stopped several times at various places to do errands, also parked at a restaurant where he had something to eat. During these times, the truck was alongside the highway, and the casings were in view of any passer-by. Sometime later, when he was in Northern Michigan at Cheboygan to get Christmas trees, a state police officer stopped him and inquired about the casings. He told the officer that he had taken them and sold them for $28.00 a ton at Flint; and that he did not think they were any good or that anybody would care if he took them. An agent of

the Federal Bureau of Investigation later called at his home and left word that he wanted to see him. As soon as Morissette received the message, he went to see the agent, told him that he had taken the casings and sold them at Flint, and repeated that he had thought they were no good to anyone.

Morissette was later indicted for unlawfully, wilfully, and knowingly stealing and converting the metal casings to his own use, in violation of Title 18, United States Code, Section 641.

The statute provides:

> "Whoever embezzles steals, purloins, or knowingly converts to his own use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;
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> * * * * * * *
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. * * *"

The indictment against Morissette charged:

> "That on or about the 2nd day of December, A.D., 1948, at Oscoda, Michigan, in the Eastern District of Michigan, Northern Division, JOSEPH EDWARD MORISSETTE, did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18."

On his trial, Morissette testified that he did not intend to steal the property, and that he did not take the casings with any wrongful intent; and he stated that he thought they had been abandoned. Counsel for Morissette contended that he was entitled to show that there was no wrongful intent in taking the casings; and, furthermore, that the property had actually been abandoned. The trial court, however, referring to this contention and defense, said: "he took it because he thought it was abandoned and he knew he was on government property. * * * That is no defense. * * * I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property." The court, accordingly, refused to submit the question of Morissette's innocent or wrongful intent to the jury or allow it to be argued. The court stated: "I will not permit you to show this man thought it was abandoned. * * * I hold in this case that there is no question of abandoned property." On the question of intent, the trial court charged the jury: "And I instruct you that if you believe the testimony of the government in this case, he intended to take it. * * * He had no right to take this property. * * * and it is no defense to claim that it was abandoned, because it was on private property. * * * And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. * * * The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty." After the jury left, exceptions were taken, and counsel for appellant said:

> "The objection is this, as I understand the court's charge, that the taking is the intent.
>
> "THE COURT: No. I leave the question to them whether he intended to take it. He says he did.

"MR. TRANSUE: But the taking must have been with a felonious intent.

"THE COURT: That is presumed by his own act."

Upon this appeal, it is contended by appellant that where an act is made criminal by statute if "knowingly" committed, such act must be committed with wrongful or felonious intent; that where felonious intent is made an element of a crime, a specific criminal intent on the part of the accused must be proved; and that such criminal or wrongful intent is never presumed from the mere act, where wrongful intent is made an element of the crime. Counsel for Morissette submits that the question of the innocent or wrongful intent of the appellant in this case was a question of fact to be determined by the jury. Furthermore, it is contended that appellant was also entitled to have submitted to the jury the issue whether the property which he removed from the area had been abandoned.

In brief, appellant's chief contention is that he was entitled to have the court submit to the jury the question whether he took the property with felonious intent, and that the court, by its refusal to submit the question of his intent to the jury, committed reversible error.

In considering the issues, we come to the discussion of those cases where *scienter*, as an element of a statutory crime, is not expressed in the statute; where an act is made a crime if "wilfully" done; and where the act is made a crime if "knowingly" done. Various of the statutes and indictments reviewed in the adjudicated cases, in referring to the commission of the offense charged, use the phrases "unlawfully and wilfully," "wilfully and knowingly," and "unlawfully, wilfully, and knowingly"; and many courts have passed upon the meaning to be given these different terms.

When used in a criminal statute, "wilfully" generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely; without ground for believing it is lawful; or conduct marked by careless disregard whether or not one has a right so

to act. *United States* v. *Murdock*, 290 U. S. 389, 394, 395.

Whether *scienter* is a necessary element of a statutory crime, though not expressed in the statute, is a question of legislative intent to be answered by a construction of the statute. *United States* v. *Balint, et al.*, 258 U. S. 250. In the foregoing case, defendants were indicted for unlawfully selling a derivative of opium, and demurred on the ground that the indictment failed to charge that they had sold the inhibited drug knowing it to be such. The court held that whether *scienter* was a necessary element in a crime was a question of legislative intent to be ascertained by the court. In that case, it is to be noted, however, that there was no provision in the statute making the act criminal if "knowingly" committed. It seems to follow, from the authority of the *Balint* case, that although *scienter* is not made an element of an offense, yet by construing the statute through ascertainment of the legislative intent, *scienter* may be found to be necessary to its commission. If the offense is statutory, and intent or knowledge is not made an element thereof, a conviction may be had upon proof of its commission. *United States* v. *Reese*, D. C. Tenn., 27 F. Supp. 833. In *United States* v. *Schultze*, D. C. Ky., 28 F. Supp. 234, where a certain act was declared unlawful in a criminal statute, it was held that a defendant might be guilty on commission of the act, even though there was no evidence of any guilty knowledge or intent upon his part. But the court emphasized that the statute in question had failed to use the word "willfully' or the word "knowingly" or any similar phrase.

In *Mackey* v. *United States*, 6 Cir., 290 F. 18, the court had occasion to pass upon the question whether *scienter* was a necessary element of a given statutory crime, and in its consideration of the case, referred to the *Balint* case, remarking that the statute in that case did not make knowledge an element of the offense. The opinion went on to say that it was held in the *Balint* case that the manifest purpose and intent of Congress was to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition

of the statute. The court observed that the Anti-Narcotic Act, there under consideration, was a regulatory measure, and quoted the Supreme Court, as follows:

> "Many instances are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is eventually upon the achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se."

The court then went on to say:

> "In determining the legislative intent, consideration should be given to the nature of the offense with which the statute deals, and particularly where a crime involves moral turpitude and the statute does not describe the offense, but merely uses the common-law name, as 'larceny,' * * * All the cases sustaining indictments which fail to aver scienter, to which our attention has been called, charged acts of commission in violation of prohibitory statutes, in which knowledge and intent was not made an element of the offense. In such cases there is a strong presumption that it was the legislative intent that averment and proof of scienter should not be required."

From the foregoing, the conclusion is evident that, in statutory crimes, generally, where the emphasis of the statute is upon some social betterment, *scienter* is not an element of the offense; but where the emphasis is upon the punishment of crime, as in cases of *mala in se*, *scienter* is a necessary element, even where not so specified in the statute.

It is said that the meaning of the word "willful" depends upon the nature of the criminal act and the facts of the particular case, and that it is only in a few criminal cases that "willful" means "done with a bad purpose"; that, generally, it means no more than that the person charged with the duty knows what he is doing; it does not mean that, in addition, he must suppose

that he is breaking the law. *Townsend* v. *United States*, App. D. C., 95 F. 2d 352, 358. But although it is within the power of the legislature to make an act criminal in the absence of criminal intent, yet where there is nothing in a statute to indicate an intent to punish an innocent, though intentional, taking away, the use of the term "willful" in reference to such taking, implies an evil intent without justifiable excuse. *People* v. *Jewell*, 138 Mich. 620. Wilfulness, it has been held, when used to characterize an act in the realm of criminal law, means more than mere voluntariness. "It implies a purposeful design to do a thing with evil or illegal design." *Bowles* v. *Jung, et al.*, D. C. Cal., 57 F. Supp. 701, 709.

In *Spies* v. *United States*, 317 U. S. 492, the court was confronted with the problem of the different meanings of the word "willful," as used in various sections of the Internal Revenue Code, and in discussing the distinction, said: "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. . . . It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer." In *United States* v. *Perplies*, 7 Cir., 165 F. 2d 874, 876, the court, in distinguishing between the use of the word "wilful," as used in felony and in misdemeanor statutes, said: "The

defendant asserts that the word 'wilful' as used in criminal statutes implies an evil intent or motive, and the court erred in the instant case by not so instructing the jury. We do not agree that in all criminal statutes the word 'wilful' must be so construed. The context of the statute in which the word 'wilful' is used is often most important. * * * In statutes involving moral turpitude and therefore constituting felonies, the word 'wilful' is usually given the meaning contended for by the defendant, but the use of the word 'wilful' is without such implication in misdemeanor statutes. *Fields* v. *United States,* App. D. C., 164 F. 2d 97, 100."

Whatever qualification there may be in the various cases in which an offense is made criminal by statute where "unlawfully" committed or "wilfully" committed, the decisions seem uniform that where an offense is made a crime by statute only where "knowingly" committed, it is necessary to prove felonious intent. In this case, the principal argument appellant submits to us is that he had the right to have the jury decide whether he took the property with felonious intent.

"Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. 'The word "wilfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood, says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. i., sect. 428." *Felton* v. *United States,* 96 U. S. 699, 702. Where an act must be "knowingly and willfully" done to be criminal, not only a knowledge of the act is implied, but a determination with a bad intent to do it; and the presumption of wrongful intent, based upon the natural result of the words or acts, while constituting strong evidence of the presence of such intent, is not conclusive, but rebuttable. Such rebutting evidence may take the form of testimony by the defendant that he intended no such result. *Bentall* v. *United States,* 8 Cir., 262 F. 744, 746. In *United States*

v. *Starkey*, D. C. Ill., 52 F. Supp. 1, Judge Lindley, in a case in which a defendant was found guilty of a statutory offense, observed: "The word 'knowingly' in a criminal statute commonly means that state of mind wherein the person charged is in possession of facts under which he is aware he can not lawfully do the act with which he is charged." In *Ex parte Stewart*, D. C. Cal., 47 F. Supp. 415, 417, in passing upon the element of *scienter* in the violation of the Selective Training and Service Act, it was said: "However, because the statute uses the word 'knowingly' (50 U. S. C. A. Appendix Section 311), which implies wilful knowledge and a specific intent, we have allowed defendants in Selective Service cases to give their reasons for failure to obey, as going to intent." Likewise, in *United States* v. *Hoffman*, 2 Cir., 137 F. 2d 416, it was held that to "knowingly fail or neglect" to perform a duty required by the Selective Training and Service Act, there must be present the usual criminal intent. In *United States* v. *Martinez*, D. C. Pa., 73 F. Supp. 403, 407, where a defendant attacked an indictment for failure to allege knowledge of defendant, the court considered the matter as one of form and held that in the ordinary acceptation, "the words 'unlawfully, willfully, and knowingly,' when applied to an act or things done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing."

From the foregoing, it seems plain that the statute, in making criminal an act where one "knowingly" converts to his use government property, implied a conversion with bad purpose and evil intent. If more were required to sustain the conclusion that felonious intent was an element of the crime set forth in the statute, the meaning of the phrase, "knowingly converts to his use," could well be ascertained by reference to the other anomalous words associated with the statute under the doctrine of construction *noscitur a sociis*. The provision in the statute reads: "Whoever embezzles, steals, purloins, or knowingly converts to his use . . . ." The terms, "embezzles," "steals," and "purloins," give color to the term "knowingly converts to his use." In

Neal v. *Clark*, 95 U. S. 704, the Supreme Court had before it a statute which provided that no debt of a bankrupt created by his fraud should be discharged. The question was whether the statute referred to implied fraud, also known as fraud in law, or whether it meant positive fraud, or fraud in fact. In laying down the rule for the construction of the statute, the court said: "It is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' So, also, 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.' In *Broom's Legal Maxims*, p. 450, it is said: 'It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*,—the coupling of words together shows that they are to be understood in the same sense. And where the meaning of any particular word is doubtful or obscure, . . . the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words. * * * 'In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter.' Applying these rules to this case, we remark, that, in the section of the law * * * which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." Pages 708, 709. With equal force it can be said in the instant case that the words, "knowingly

converts to his use," coupled with the words, "embezzles, steals, purloins," involving moral turpitude, mean a conversion to his use, with evil intent—if such intent be an element of embezzlement, stealing, and purloining.

There is no question that to constitute embezzlement, there must be a fraudulent intent to deprive the owner of his property and appropriate the same; *Hancey* v. *United States*, 10 Cir., 108 F. 2d 835; *Hubbard* v. *United States*, 9 Cir., 59 F. 2d 850; *Fortney* v. *Commonwealth*, 290 Ky. 659, 162 S. W. 2d 193; and such intent is always a question for the jury; *Lindgren* v. *United States*, 9 Cir., 260 F. 772. Stealing has frequently been said to be synonymous with larceny; and to purloin means to commit larceny or to steal. *Thompson, et al.* v. *United States*, 2 Cir., 256 F. 616. It might be that because of the particular wording of a statute or on account of special circumstances, the terms "steal" or "purloin," as employed in a given case, would not import larceny. But here there is no reason to suppose that they do not.

Moreover, a resort to the history of the statute itself reveals that it is concerned with embezzlement and larceny. Title 18 U. S. C. A., Section 641 (1950 Revised Ed.), consolidates Sections 82, 87, 100, and 101 of Title 18 U. S. C., 1940 ed. See Reviser's Notes Title 18 United States Code, Congressional Service, p. 2505 (1948 Ed.).

Title 18 U. S. C. A., Section 82 (1940 Ed.), which was consolidated in the present Title 18 U. S. C. A., Section 641, provided, in so far as here applicable, that "Whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin" any property of the United States, would be punishable by fine or imprisonment or both. Title 18 U. S. C. A., Section 87 (1940 Ed.), provided that "Whoever shall steal, embezzle, or knowingly apply to his own use," arms or property to be used for the armed forces should be similarly punished. Title 18 U. S. C. A., Section 100 (1940 Ed.), provided that "Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever" of the United States should be similarly punished. Title 18 U. S. C. A., Section 101

(1940 Ed.), provided that "Whoever shall receive, conceal, * * * or shall have or retain in his possession * * * any money, property, * * * or valuable thing whatever, * * * of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined," shall be similarly punished.

"Changes necessary to effect the consolidation (of the above sections) were made. Words 'or shall willfully injure or commit any depredation against' were taken from said section 82 *so as to confine it* (Section 641) *to embezzlement or theft.*" (Emphasis supplied.) Reviser's notes. Title 18 United States Code, Congressional Service, p. 2505 (1948 Ed.).

Prior to the consolidation of Title 18 U. S. C., Section 87, in the present Section 641, it was held that such section dealt with "larceny." *Price* v. *United States,* 5 Cir., 74 F. 2d 120. In *Crabb* v. *Zerbst,* 5 Cir., 99 F. 2d 562, it was observed that the counterpart of Title 18 U. S. C., Section 100, which was repealed and re-enacted as a part of the Criminal Code of 1909, was included in the repealing section of the Code as "An Act to punish certain larcenies and the receivers of stolen goods." It was said by the court that the section denounced embezzlement by name, without definition; and then, to cover such cases as may shade into larceny, as well as any new situation which may arise under changing modern conditions and not envisioned under the common law, it added the words "steal or purloin." The court remarked that between embezzlement and larceny "there lies a gap which has grown wider and wider as the multifarious activities of the central government have spread and increased. Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word *purloin.* * * * Where the offense is embezzlement, or its nature so doubtful as to

fall between larceny and embezzlement, it may be prosecuted under Section 47." Title 18 U. S. C., Section 100 (1940 Ed.) *Crabb* v. *Zerbst, supra,* p. 565.

Title 18 U. S. C., Section 101 (1940 Ed.), which was consolidated in the present Section 641, relates only to the offense of receiving and concealing property of the United States, which has been embezzled, stolen, or purloined by another, with knowledge of such embezzlement or theft.

That the phrase, "knowingly converts to his use," in a criminal statute, was intended by Congress to import larceny, seems clear from the employment of this particular language. It could not have been intended to mean a conversion merely in a civil sense, the commission of which is, in itself, the offense. Intent to convert to one's own use is, by the weight of authority, one of the elements of larceny. *McIntosh* v. *State,* 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798, with annotation; and in Bouvier's Law Dictionary, Rawle's Third Revision, one of the definitions of larceny is given as the felonious taking of the property of another without his consent and against his will, with the intent to convert it to the use of the taker. It seems a fair assumption that in drawing the statute, Congress considered that the felonious conversion of property of the government to one's own use, was larceny, and used conventional phrasing to express that intention.

An examination of the foregoing sections, and Section 641, in which they were finally consolidated, in the light of the words used in the sections themselves, the decisions of the courts, and the notes of the revisers of the present Criminal Code, leaves no doubt that the offenses made criminal by the latter section are embezzlement, larceny, and offenses falling between embezzlement and larceny, as well as the concealment of stolen property with knowledge that it has been stolen, or the application to one's own use of property furnished to the armed services, with knowledge that it had been stolen. We are not here concerned with embezzlement or concealment, or application to one's own use, of stolen property, but

only with larceny, stealing, or purloining. The felonious taking and carrying away of property constitute the common law offense of larceny; and the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses, which are often denominated "theft" or "stealing." *Crabb* v. *Zerbst, supra*, p. 564. From the foregoing, it can be said that, aside from extreme verbal refinement, the offenses of stealing and purloining property and knowingly converting it to one's use, made punishable by the criminal statute in this case, are all equivalent to common law larceny.

In *Frach* v. *Mass.*, 9 Cir., 106 F. 2d 820, the court said that "Larceny of property of the United States is made a crime by 18 U. S. C. A., Section 82." That section, consolidated in present Section 641, as has been observed, referred to "Whoever shall take and carry away or take for his own use, * * * with intent to steal or purloin" property of the United States. In *United States* v. *Anderson, et al.*, D. C. Cal., 45 F. Supp. 943, 945, the court, in referring to Title 18 U. S. C. A., Section 82, said: "This means, of course, that in interpreting the statute, we may apply the principles governing the common law crime of larceny, as interpreted by the courts of various states."

On this general subject, it remains finally to be said that, from the language of the indictment and the brief of the district attorney, it appears that the government has always considered that Morissette was being proceeded against on an indictment for larceny, under a statute providing penalties for larceny. The indictment charges that appellant "did unlawfully, wilfully and knowingly steal and convert to his own use" the property in question. As heretofore outlined, the cases hold that a charge that an accused "unlawfully, wilfully and knowingly" committed an act condemned by a criminal statute, imports its commission with criminal or evil intent. The use of the phrase, "steal and convert to his own use" clearly charges larceny. The indictment itself is entitled, "(Theft of Government Property)." The citations in

the government brief are principally concerned with the elements of larceny and the nature of the intent necessary to constitute the crime; and it is emphasized that, by any rule of law, appellant's act constituted the stealing of government property. Moreover, it appears that the government assumed that it was necessary to charge a felonious intent in this case for, in answer to appellant's contention that the indictment was defective for failure to charge such intent, it replied that the term "unlawful" (as used in the indictment in this case) "is an adequate substitute for 'felonious,' "; and it further supported its argument by relying upon rulings that where an indictment for theft used the words "wilfully and unlawfully," rather than "knowingly" or "feloniously," it was unnecessary for the indictment "to contain such formal words, *where the allegations thereof necessarily or fairly import guilty knowledge.*" (Emphasis supplied.)

That the government recognized from the foregoing that the conversion of which appellant is accused must be committed feloniously or with guilty knowledge is further pointed up in its brief where it argues that a jury may infer a man's intent from his acts, citing *Harris, et al.* v. *United States*, 9 Cir., 48 F. 2d 771. Strangely, that is exactly what appellant contends—that he was entitled to have the question of his innocent or felonious intent submitted to the jury, and the government agrees that felonious intent is an element of the crime charged against Morissette, when it argues that the district court was correct in holding that felonious intent was "presumed by his (Morissette's) own act." Thus, while it argues that the "*animus furandi* must accompany the taking to constitute 'larceny,' " it contends that here "the wrongful taking of property in itself imports the *animus furandi*."

At common law, the *animus furandi*, or specific intent to steal, is an essential element of the crime of larceny. *Ryan* v. *United States*, 26 App. D. C. 74. Where a crime consists of an act, combined with a specific intent, the intent is just as much an element of the crime as is the

act. In such cases, mere general malice or criminal intent is insufficient, and the requisite specific intent must be shown as a matter of fact, either by direct or circumstantial evidence. *Savitt* v. *United States*, 3 Cir., 59 F. 2d 541. Proof of the commission of an unlawful act does not warrant the presumption that the accused had the requisite specific intent. *United States* v. *Hughes*, 278 F. 262. Where a statute (18 U. S. C. A., Section 87) provided that anyone who should steal, embezzle, or knowingly apply to his own use property furnished to or to be used by the armed services, was guilty of a crime, and a person purchased property furnished for the armed services from a soldier at a price disproportionate to its value, it was held that such a purchase, when considered with other evidence, supported an inference of "guilty knowledge" on the part of the purchaser, "i. e., that he did 'knowingly apply to his own use' property of the United States; *that while so doing he knew the property was stolen.*" (Emphasis supplied.) *Adolfson* v. *United States*, 9 Cir., 159 F. (2d) 883. In passing upon the question of proving such guilty knowledge by all the surrounding facts and circumstances, the court said: "We regard this evidence as relevant and competent for the purpose of showing the charged 'guilty knowledge' as a *fact*. This because the existence of this 'knowledge' of the character and value of the property was a material and necessary element in the prosecution's chain of evidence and it was therefore proper to submit it to the jury on the question of whether or not this guilty knowledge existed and was proven beyond a reasonable doubt." "The color of the act determines the complexion of the intent only in those situations where common experience has found a reliable correlation between a particular act and a corresponding intent." *Hubbard* v. *United States*, 9 Cir., 79 F. (2d) 850, 853. While a person is presumed to intend to do that which he does, and especially so when the things are done in the commission of a crime, nevertheless, such a presumption does not exist where specific intent must be proved as a necessary element of the offense. If it appears that a taking of property was

consistent with honest conduct, although the party charged with the crime may have been mistaken, he can not be convicted of larceny. *Flint* v. *State*, 143 Fla. 259, 196 So. 619.

Every taking of another's property without legal justification is a trespass upon the owner's right to its continued possession, but it does not constitute a crime of larceny unless the act is perpetrated feloniously, that is, *animo furandi*, or with the intention to steal. *Johnson* v. *State*, 73 Ala. 523; *Rountree, et al.* v. *State*, 58 Ala. 381. An essential element of larceny is that the property of another, which is taken away without his consent, should be taken with a felonious intent. The crime implies theft, and one can not be deemed guilty of larceny, without felonious intent to deprive the owner of his property; and such intent must be proved. *United States* v. *One 1941 Chrysler Brougham Sedan*, D. C. Mich., 74 F. Supp. 970.

In *Landen* v. *United States*, 6 Cir. 299 F. 75, 78, 79, it is said: "The principle that even a mistake of law may protect one accused of crime has familiar illustration in the rule that, if the respondent in a prosecution for larceny took the property in a goodfaith, though erroneous, belief that he had the legal right to its possession, he is not guilty."

In *Hargrove* v. *United States*, 5 Cir., 67 F. (2d) 820, the court had occasion to review instruction to a jury in a criminal case in which the trial court had charged that the question of wilfullness and intent depended upon whether it found that the defendant wilfully and knowingly did what he intended to do; and that while a man might have no intention to violate the law, yet if he wilfully and knowingly did a thing which constituted a violation of the law, he violated the law. On appeal, these instructions were held erroneous and the judgment was reversed in an opinion in which it was said: "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its willful doing. In the first

class of cases, . . . the law imputes the intent. . . . Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence. . . . For this error the judgment is reversed. . . ." Pages 823, 824.

The general rule that a criminal intention will be presumed from the commission of the unlawful act does not apply where *scienter* is an element of the crime; and proof of the commission of the act does not warrant the presumption that accused had the requisite specific intent. Felonious intent is not presumed. *Hubbard* v. *United States*, 79 F. (2d) 850.

In *United States* v. *Hughes*, 278 F. 262, 265, where an alien was accused of knowingly circulating printed matter advocating the overthrow, by force or violence, of the government of the United States, the court said: "That statutes creating an offense 'knowingly' committed import knowledge as to all the essential ingredients of the offense is an undoubted and well-recognized rule of construction and a reasonable one. If the mere distribution without further knowledge were sufficient, the word 'knowingly' would be superfluous, as one could not well distribute circulars without knowledge that he was distributing them."

As an instance of evidence of intent, the accused is entitled to introduce any fact which tends to disprove a felonious intent, and his conduct in connection with the act of taking, such as, that he took the property openly in the presence of others, and made no effort to conceal his taking or possession. See *Johnson* v. *State*, 73 Ala. 523. And where the accused has requested a charge that if the taking was open, a presumption arises that there was no felonious intent, it is held that refusal so to charge was error. *Bivins* v. *State*, 24 Ala. App. 373, 135 So. 603; *Floyd, et al.* v. *State*, 23 Ala. App. 216, 123 So. 103.

From the foregoing, we are constrained to hold that the trial court, in the instant case, erred in instructing the jury that felonious intent was presumed from the act

of appellant in taking the casings, and, further, that the fact that he knowingly took them imported intent on his part—specific wrongful intent. The intent of appellant was the crucial point in the case. Whether his intent was innocent or wrongful was a question for the determination of the jury.

In addition to the issue of intent, in this case, there is also the question of abandonment. Abandonment is the intentional relinquishment of a known right to property. *New Jersey Zinc Co.* v. *Signmaster, et al.*, D. C. N. Y., 4 F. Supp. 967. It means virtually throwing the property away; it is a relinquishment of property to which a person is entitled, with no purpose of again claiming it, and without concern as to who may subsequently take possession of it. *Wilmore Coal Co.* v. *Brown, et al.*, 147 F. 931. If an owner throws the property away or voluntarily forsakes it without any intent to repossess it or reclaim it, it becomes abandoned. *Summers* v. *Atchison, T. & S. F. Ry. Co.*, 2 F. (2d) 717; *Helvering* v. *Jones*, 8 Cir., 120 F. (2d) 828; *Equitable Life A. Soc.* v. *Commerce B. & T. Co.*, 8 Cir., 155 F. (2d) 776. It is said that the act of abandonment may be by an overt act or some failure to act which carries the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment. *Landay* v. *MacWilliams*, 173 Md. 460, 196 A. 293, 114 A. L. R. 984. The primary elements of abandonment are the intention to abandon and the external act by which the intention is carried into effect; and the intent to abandon need not appear by express declaration of the party, but may be inferred from the situation of the property. *Log-Owners' Booming Co.* v. *Hubbell*, 135 Mich. 65, 97 N. W. 157. Ordinarily such intent may be ascertained from the acts and conduct of the owner; *City of New London* v. *The Pequot Point Beach Co., et al.*, 112 Conn. 340, 152 A. 136; but whether there has been an intent to abandon and an abandonment is a question of fact to be determined by the jury under all the circumstances of the case. *Kister Oil Development Corp.* v. *Young, et al.*, 27 F. (2d) 433; *Wilmore Coal Co.* v. *Brown, et al., supra; Cadillac Oil &*

Gas Co., v. *Harrison, et al.*, 196 Ky. 290, 244 S. W. 669. It is the exclusive province of the jury to determine the intent with which the accused performed the alleged criminal act relied upon to establish the felonious taking and carrying away of the property, and the accused person may testify as to the intent with which he took the property. *State* v. *Williams*, 95 Mo. 247, 8 S. W. 217.

Where one takes personal property into his possession in the honest belief that it is abandoned by its owner, he is not guilty of larceny. *Johnson* v. *State*, 36 Tex. 375; *Jordan* v. *State*, 107 Tex. Cr. 414, 296 S. W. 585.

There is no reason why the government may not abandon property as well as an individual. The fact that, in taking abandoned property, a trespass is committed upon the land of one who has abandoned it, does not change innocent intent into felonious intent, or alter the fact that the property may have been abandoned. Such a trespass would be a circumstance to which much importance might be attached by the jury in determining the intent with which the property was taken, as well as in determining whether the property had been abandoned. But such a trespass is not conclusive on the question of a wrongful taking. In *Bodee, et al.* v. *State*, 57 N. J. Law 140, 30 A. 681, where the accused was charged with stealing coal from a railroad right-of-way and his defense was that he thought the coal had been abandoned, it was held that testimony was admissible to show a practice of owners of coal on the one hand, and of poor people on the other, with regard to gathering up coal dropped in unloading cars, on the issue whether the owners had abandoned such coal, and whether others who picked it up thought that it was abandoned.

In the instant case, it appears that, in spite of warning signs, the area of the bomb base was used by many hunters for deer hunting. It was a wild place, largely woodland, and was located in the hunting country. The fact that it was leased from the state for the purpose of permitting the dropping of the casings to simulate bombs is not conclusive proof that the government did not abandon the casings after they had been exploded and

cleared off the target area. Of course, it could not reasonably be contended that one who removed property from the home or from the immediate personal possession of another did so in the belief that it was abandoned; nor, in such a case, could one rely upon the claim that it actually had been abandoned; but that is not this case. The question of wrongful or innocent taking, or whether the property was abandoned, must be judged according to the facts of each case.

On the question of abandonment, appellant testified that he removed the casings because he thought they were abandoned. They had been cleared off the range to get them out of the way after they had been used, and were piled up in a heap in the midst of the woods at a considerable distance from the nearest road. They were exposed to the weather and were pretty well rusted out. Some were practically decomposed, and others were in the process of decomposition. Photographs taken of another pile in the woods, which admittedly was similar to the one from which Morissette took the casings, showed a disorderly heap of bent, crushed, and disintegrating metal casings, giving an impression of a deserted pile of disused junk. There seems to have been nothing to indicate to anyone that the casings were to be used again, and the fact that they had been allowed to lie in the open weather for several years might indicate to an ordinary man either that someone in authority was culpable in allowing the casings to decompose, rust away, and become worthless and useless, or that they were considered of no further use or value and had, accordingly, been discarded and thrown away. The evidence submitted by appellant, under the issues in the case, required submission to the jury, not only of appellant's good faith and innocent intent in taking the casings, but also the question whether the property had been abandoned by the government, for even without direct proof of intent to abandon, the jury could, under the circumstances of this case, draw reasonable inferences that the government had intended to, and did, abandon the property. The district court, in my opinion, therefore, erred in refusing to permit the

introduction of evidence of abandonment, and in refusing to submit to the jury for its determination whether the property had been abandoned.

The main issue in the case, however, was whether appellant was entitled to have the jury decide he had taken the property innocently or with felonious intent. In refusing to permit this issue to be decided by the jury, the district court, in my opinion, committed reversible error.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Joseph Edward Morissette* v. *United States of America*, No. 10,974, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 12th day of February, A. D. 1951.

J. W. MENZIES,

Clerk of the United States Court of Appeals for the Sixth Circuit.

(SEAL)

[fol. 94] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 593

ORDER ALLOWING CERTIORARI—Filed May 7, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.